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Select Committee  
Final report of  
the Select  
Committee on Water  
Marketing to the

# REPORT OF THE SELECT COMMITTEE ON WATER MARKETING

## 49TH LEGISLATURE STATE OF MONTANA

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**FINAL REPORT**  
**OF THE**  
**SELECT COMMITTEE ON WATER MARKETING**  
**TO THE**  
**49TH LEGISLATURE**  
**STATE OF MONTANA**

**JANUARY 1985**

**Senator Jean Turnage, Chair**

**Representative John Shontz, Vice-Chair**

<b>Representative Dan Kemmis</b>	<b>Senator Chet Blaylock</b>
<b>Representative Dennis Iverson</b>	<b>Senator Dave Manning</b>
<b>Representative John Harp</b>	<b>Senator Jim Shaw</b>

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*The Big Sky Country*

## MONTANA STATE SENATE

January 1985

President of the Senate  
Speaker of the House  
Montana Legislature

Gentlemen:

No more important natural resource issue faced the 48th Legislature, which met January 3 to April 21, 1983, than the question of marketing Montana's waters. Based upon the work and recommendations of the Select Committee on Water Marketing, whose report I am honored to transmit, Montana's policies for the management, conservation, and use of its waters will be a vital issue facing the 49th and future Legislatures as well.

The 48th Legislature was highlighted by deliberations over whether Montana should market its waters - principally for industrial uses and particularly for coal slurry. There were some who urged us into immediate action based on their prediction that, if Montana did not act swiftly to market its surplus waters, two undesirable results would occur. First, downstream states would satisfy the demand and reap the financial rewards. Worse, in doing so, they would appropriate, put to use, and remove from Montana's eventual use those waters involved.

The 48th Legislature did act to suspend the constitutionally suspect ban against out-of-state exports of water (MCA § 85-1-121) and to allow limited water marketing from Fort Peck and other federal reservoirs. Its members, however, chose not to adopt a hastily conceived and insufficiently understood water marketing program. The Legislature's principal response, with the passage of House Bill 908, was to mandate a two-year study of water marketing by a Select Committee which it has been my privilege to chair.

Events have demonstrated the wisdom of this caution. Although interest in the water marketing concept continues to grow, there has not developed a regional water market. There has been no serious interest in the purchase of water from Fort Peck. In fact, the sale by South Dakota of 50,000 acre feet of water per year from Oahe Reservoir to the ETSI coal slurry pipeline conglomerate has fallen through.

This market hiatus has benefitted the committee's work. When initially proposed to the Legislature, the water marketing concept diverted attention away from the more important issue: what should be Montana's water policy in an interstate setting?

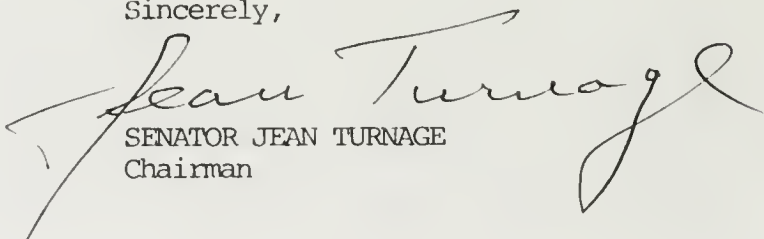
I am pleased to report that, in eight meetings of the Select Committee over the last 19 months, this broader inquiry has been addressed. We have received the insightful testimony of concerned Montana citizens and organizations. We have benefitted from the expertise of practitioners and scholars from Montana and other western states. We have been aided by the cooperative efforts of the departments of Natural Resources and Conservation and Fish, Wildlife, and Parks. The committee is particularly indebted to the Lincoln Institute of Land Policy, which cosponsored two excellent legal and policy seminars on interstate water issues.

This document is the complete final report of the committee. It includes the recommendations that were unanimously approved by all members of the committee in attendance at its meeting on December 3, 1984. The committee has already submitted a summary report to the Legislature.

Many of the recommendations in this report specify actions that should be taken by the 49th Legislature. Other recommendations set forth an agenda of water issues that must be systematically addressed by the Legislature and the citizens of the state in the years to come. These recommendations concern a strategy for a water policy for Montana in an interstate setting. This agenda is too important and too complex to be addressed by one interim committee or one legislative session. These issues significantly affect the future of Montana. The deliberations around them must be ongoing.

In behalf of all members of the Select Committee, I urge your careful consideration of this report.

Sincerely,



SENATOR JEAN TURNAGE  
Chairman

THE COMMITTEE AND STAFF WISH TO EXPRESS THEIR  
PARTICULAR APPRECIATION TO TED DONEY AND  
GARY WEATHERFORD FOR THEIR ASSISTANCE IN THE  
PREPARATION AND REVIEW OF THIS REPORT.



## OVERVIEW OF THE COMMITTEE'S RECOMMENDATIONS

The following is an overview of the major recommendations of the Select Committee on Water Marketing to the 49th Legislature.

### A. REGULATING THE INTERSTATE MOVEMENT OF WATER

1. Ban on the exportation of water. The statutory ban on the exportation of water from Montana (MCA § 85-1-121) should be permanently repealed; and, with appropriate safeguards, Montana's waters should be permitted to move interstate.
2. Permit criteria. Applications to appropriate large quantities of new water [4000 acre feet/year (ac-ft/yr) and 5.5 cubic feet/second (cfs)] or to change the use or location of presently appropriated water - especially when these applications contemplate the interstate movement of water - should be closely evaluated with reference to detailed public interest criteria (MCA § 85-2-311).
3. Water for coal slurry purposes. With safeguards appropriate to protect the state, its environment, and its citizens, Montana's ban on the use of water for coal slurry purposes (MCA § 85-2-104) should be repealed.
4. Coverage of pipelines under the Major Facility Siting Act. The committee recommends that the siting of all future pipelines exceeding 30 miles in length and 17 inches in diameter be covered by the provisions of the Major Facility Siting Act (MCA § 75-20-101 et seq.).

### B. STATE WATER LEASING PROGRAM

5. Limited water leasing program. The committee recommends a limited state water leasing program involving 50,000 ac-ft of impounded water. A lease, for a period not to exceed 50 years (which can be renewed), would be required to obtain water in two instances: (a) for transport, in any amount, outside of specified water basins; or (b) for any beneficial water use where consumption would exceed 4000 ac-ft/yr and



5.5 cfs. Lease applications would be reviewed under the public interest criteria of MCA § 85-2-311 (as proposed) and, in most cases, through an environmental impact statement.

6. Acquisition of water. Water for the water leasing program would be obtained from (a) specified existing federal reservoirs (i.e., Fort Peck, Canyon Ferry, Tiber, Hungry Horse, Yellowtail); or (b) other existing or future reservoirs in adjudicated basins.

7. Use of water leasing proceeds. The committee identifies numerous possible uses of proceeds from the water leasing program.

C. MAXIMIZING MONTANA'S FAIR SHARE OF MISSOURI RIVER BASIN WATER  
"GETTING MONTANA'S HOUSE IN ORDER"

8. General stream adjudication. The committee urges an expeditious and accurate completion of the statewide water adjudication process. The committee recommends that the Legislature support any justified funding request from the water courts.

9. Indian and federal reserved water rights. The committee recommends support for legislation to extend the Reserved Water Rights Compact Commission for two years and the appropriation of adequate funds for the commission to complete its goals.

10. Water resources data management system. The committee recommends the establishment with the Department of Natural Resources and Conservation (DNRC) of a centralized water resources data management system making readily accessible to the state's policymakers necessary information on the state's water resources, existing and projected uses, and existing and projected demands.

11. Water reservation system. Additional funds should be appropriated to ensure adequate monitoring and perfection of the existing Yellowstone water reservations. Water reservations similar to those developed for the Yellowstone River Basin should be prepared for the Missouri River Basin and funds should be appropriated to provide the necessary technical and financial assistance to applicants. Any reservation application proposing out-of-state use of water should be evaluated with

reference to detailed public interest criteria. The DNRC should continue its public education program concerning the merits and procedures of the reservation process.

12. State water plan. The committee strongly urges DNRC to comply with the provisions of MCA § 85-1-203 which requires the preparation of a state water plan, its approval by the Board of Natural Resources and Conservation, and its submission to each general session of the Legislature.

13. Water development. The committee recommends continued funding and bonding for identifying, developing, and constructing water projects within the state. The DNRC, Montana's Washington, D. C. office, and the state's Congressional delegation should work actively for the authorization and funding of federal projects within the state.

14. Water policy committee. The committee recommends the creation of a permanent legislative water policy committee to advise the Legislature, in an ongoing way, on water policy and issues of importance to the state.

#### "RELATING TO OTHER STATES IN THE MISSOURI RIVER BASIN"

15. Preparation for negotiations and possible litigation. Montana should systematically prepare for negotiations and potential litigation with other Missouri River Basin states.

16. Efforts toward an interstate compact. Efforts toward negotiating a compact among the Missouri River Basin states should be a high priority of Montana. While DNRC should have lead responsibility in this effort, the Legislature's water policy committee should be active in and supportive of these efforts.

#### D. MISCELLANEOUS PROVISIONS

17. Miscellaneous provisions. The committee makes certain miscellaneous and technical recommendations.





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## INTRODUCTION

In its nearly 100 years of statehood, Montana has been variably called the "Treasure State" or the "Big Sky Country." The discovery of precious metals and other minerals brought about the settlement of the state and its admission to the Union. These minerals still constitute an important part of Montana's economy. Also, Montana's varied landscapes, with their expansive skies are a continuing element of Montana's identity. Less well-recognized is the significance of Montana's waters to the economy and character of the state. These waters originating in our mountains, joining with such rivers as the Mississippi and Columbia, eventually drain into three oceans. Treasure and sky are important, but Montana is truly the "Headwaters State."

The history and culture of our state are integrally linked with our waters - principally the waters of the Missouri and its tributaries. Before Europeans found their way into these quarters, the native people of the region were spiritually and practically reliant on the river. The journey of Lewis and Clark up to Three Forks and beyond opened the west. The fur trade of the 1800s resulted in a series of settlements along the river. Price Maximilian and Karl Bodmer, as a result of their scientific and artistic journey in the 1830s made famous the landscape and Indian inhabitants of the region. Steamboats operated up as far as Fort Benton from the mid 1800s to the early 1900s providing the materials and goods for the settlement in this new terrain. The major dams on the Missouri's mainstem - Canyon Ferry, Hauser, Holter, Fort Peck - have provided hydropower for the electrification and industrialization of the region as well as water for the irrigation of arid soils.

In the last several decades, the wilderness, recreational, and aesthetic importance of the river has been emphasized. A 150-mile stretch of the Missouri was designated a Wild and Scenic River by Congress in 1974. Data collected by the Montana Department of Fish, Wildlife and Parks shows that the Missouri and its tributaries received

roughly 1.4 million fisherman days of use during the 1982-1983 season. This accounts for 50 percent of the fishing activity recorded statewide. Indications are that usage by other recreationalists, including canoeists and other "floaters", has significantly increased. Montanans are also more concerned with the quality of the river - its cleanliness, as well as the visual and biological impact of human activities in its proximity.

Thus, because of our ability to dam, divert, pollute, and even sterilize these waters, we as citizens and policymakers have a special responsibility toward our lifeblood. Our stewardship is particularly important due to our location at the headwaters: what we do here with these waters will affect downstream states and users.

It was in response to this special and serious responsibility that the 48th Legislature mandated the study of water marketing by an interim Select Committee with four representatives from each of the houses of the Legislature.<sup>1</sup> The issue of water marketing became prominent during the 1983 Legislature because of the confluence of three events occurring during the six months preceding the opening of the session on January 3, 1983.

The first event was the decision of the United States Supreme Court in Sporhase v. Nebraska<sup>2</sup> in July 1982, that water is an article of interstate commerce and that absolute state statutory bans against the exportation of water are unconstitutional as violations of the dormant interstate commerce clause. In the Sporhase case, two farmers with land crossing the Colorado and Nebraska border were pumping Nebraska groundwater and exporting it from that state to irrigate their land in Colorado. The Nebraska attorney general had sought to enjoin this interstate transfer on the basis of the state statute<sup>3</sup> which, in part, prohibited such transfers to states not providing reciprocal rights.

The second event, which occurred on September 16, 1982, was the announcement by the State of South Dakota and Energy Transportation Systems, Inc. (ETSI), that South Dakota, after several months of secret negotiations, had agreed to sell 50,000 acre feet of water per year

(ac-ft/yr), from Oahe Reservoir on the Missouri for \$1.4 billion. The water would be used as the transport medium in a coal slurry pipeline to be built from coal fields in the Powder River Basin near Gillette, Wyoming, with a terminus 1300 to 1800 miles south in Arkansas and possibly Louisiana. That South Dakota might not have the right to sell the water or that the market for coal might not hold up seemed to be lost on many observers. All interest was on the exceedingly high value placed on surplus water, what ramifications the sale and diversions would have for other states in the basin (both upstream and downstream), and on the cleverness of the transaction. In some states, an alarm was sounded: "Let's get ours before we lose our chance."<sup>4</sup>

The third event was the release, also on September 16, 1982, by the Montana Department of Natural Resources and Conservation (DNRC) of its Water Protection Strategy for Montana: Missouri River Basin (the "Trelease report"). In 1981, the Legislature had directed<sup>5</sup> the department to develop a strategy to protect Montana's options for future instate water use in the face of expanding water use by downstream states. Completed by renowned water expert Frank J. Trelease and Wright Water Engineers, Inc., the study set forth a six-part strategy which, somewhat unfairly, has been widely summarized as suggesting a water development, "use it or lose it," strategy for the state. While water development is an important component of the report's recommendations, such an interpretation ignores many other equally important aspects such as a vigilant monitoring of developments in other states in the basin, completion of adjudications, adherence to Montana's water reservation system, and the encouragement of early conflict resolution. Yet, the water development features of the report took prominence - in large part due to parallel efforts to modify and expand the storage behind the Tongue River Reservoir in southeast Montana.

By the commencement of the 1983 Legislature, these three events converged. Montana needed to protect its waters, principally on the Missouri. State control over its waters had been significantly weakened by the holding in Sporhase, and its long-term effects were uncertain. South Dakota had turned the damage done by Sporhase to state water

jurisdiction into a huge, potential financial bonanza. Other states were likely to follow, with uncertain effects on the allocation of Missouri River water. Montana needed to develop its water through projects such as improvement of the Tongue River Dam, but substantial funds were needed. Therefore, the conclusion seemed logical at the time: sell water to produce revenues to fund the water development projects necessary to save Montana's water. "Use it or lose it;" put the water to use! Others questioned whether the conclusion was inherently illogical: "selling water to save it?"

In the weeks before the convening of the 1983 Legislature, water marketing was much discussed. Governor Ted Schwinden announced his interest in investigating the possible sale of Montana's surplus waters, said that he would prefer a thorough study of the issue, but that the state might not be able to wait that long ("None of the old rules apply anymore").<sup>6</sup>

The Environmental Quality Council held a hearing on "Surplus Water Marketing" on January 11, 1983, with presentations by Leo Berry, Director of DNRC and Professor Al Stone of the University of Montana School of Law, among others. In his presentation, Berry indicated that the threat to Montana's water was not South Dakota's sale to ETSI but in the downstream states' opposition to the sale which threatens "our rightful development."<sup>7</sup> Berry itemized other threats as well: diversions from the Missouri of about million ac-ft/yr to recharge the depleting Ogallala Aquifer in the High Plains and the potential of litigation or legislation to void the preference of upstream states in the consumptive use of Missouri water.

With reference to the Trelease report, Berry indicated that restricting Montana water development to maintain downstream navigation would result in major economic impact to the irrigation and energy sectors. By the year 2000, these losses could range between \$35 and \$69 million (in 1980 dollars) to agriculture and between \$233 and \$476 million in energy related taxes. While describing the six-part strategy of the Trelease report, Berry drew the "relationship between water marketing and the accomplishment of this strategy component [water



development]."<sup>8</sup> He described the "potential option" of marketing 200,000 ac-ft/yr of stored and surplus water for instate and out-of-state industrial and other purposes.

For his part, Professor Stone indicated that DNRC already had the authority to market water intrastate<sup>9</sup> and to fix prices, charges, and rates.<sup>10</sup> Because of the statutory prohibitions against the export of water and the use of water for coal slurry, DNRC's practical marketing authority only extended to intrastate sales for purposes other than slurry. Stone expressed his opinion that the ban against the exporting of water was unconstitutional and that the constitutionality of the state's ban on water-based coal slurry pipelines was "a close question."<sup>11</sup>

During the 1983 session, three bills were ultimately introduced concerning water marketing. Rep. Ted Neuman introduced HB 893 for the Schwinden administration. Rep. Bob Marks introduced HB 894 in a measure closely paralleling the administration's bill. Both bills:

- o repealed the anti-export ban on water;
- o removed the absolute ban on using water for coal slurry purposes;
- o placed coal slurry pipelines under the provisions of the Major Facility Siting Act;
- o authorized the marketing of water for industrial purposes not to exceed 40 years;
- o strengthened the water permit criteria for large appropriators;
- o invested proceeds back into water resource management; and
- o created a legislative oversight committee.

Ultimately, HB 893 made it to the House floor where, during a late-night session, it was defeated. In its place, HB 908, authored by Representatives Hal Harper, Francis Bardanoue, Dennis Iverson, John Vincent, Dan Kemmis, Tom Asay, and Jay Fabrega, was considered. The bill was originally intended to strengthen the permit criteria, repeal the anti-export ban, and place large pipelines under the Siting Act. As amended and finally passed, this bill accomplished two things. First,

the measure authorized a temporary water marketing program by broadening the authority of DNRC to purchase or acquire water from any federal reservoir (not just Fort Peck, as under the then-existing law) for the purposes of "sale, rent, or distribution for industrial or other purposes."<sup>12</sup> Montana's ban against the export of water was repealed, and detailed public interest criteria for the issuance of permits (and retaining ultimate legislative approval of certain large diversions) were placed into law.<sup>13</sup> These provisions will expire on June 30, 1985, and the pre-existing law will be "revived"<sup>14</sup> unless the 49th Legislature acts.

The second accomplishment of HB 908 was the creation of a Select Committee on Water Marketing to "undertake a study of economic, tax, administrative, legal, social, and environmental advantages and disadvantages of water marketing."<sup>15</sup> Appointed at the close of the session, committee members included Senator Jean Turnage (Polson), Chair; Rep. John Shontz (Sidney), Vice-Chair; Senator Chet Blaylock (Laurel); Rep. Dan Kemmis (Missoula); Sen. Dave Manning (Hysham); Rep. Dennis Iverson (Whitlash); Sen. Jim Shaw (Wibaux); and Rep. John Harp (Kalispell). The committee has been staffed by the Environmental Quality Council.

Over the course of the two-year study, the committee has met for eight official meetings, two seminars, and three public hearings. The chronology of the committee's work is as follows:

August 4, 1983	Organization meeting (Helena)
October 1, 1983	Overview of legal issues (Helena)
December 2, 1983	Overview of water availability (Helena)
January 6 and 7, 1984	Legal seminar (Missoula)
March 3, 1984	Meeting (Helena)
May 4, 1984	Meeting (Helena)
July 13 and 14, 1984	Legal and policy seminar sponsored jointly with the Lincoln Institute of Land Policy (Billings)
September 20, 1984	Public hearing (Sidney)
September 24, 1984	Public hearing (Great Falls)

September 26, 1984	Public hearing (Bozeman)
November 8 and 9, 1984	Meeting (Helena)
December 3, 1984	Meeting (Helena)
January 24, 1985	Meeting (Helena)

In the course of its work, the committee has received extensive testimony, both written and oral, from many individuals and organizations. (See Appendix A) Also, due to the cooperation of the Lincoln Institute of Land Policy, an educational organization providing assistance to public officials in the areas of taxation and natural resource policy, two legal and policy seminars were held that produced an informative set of materials recounting the experiences of other states for the benefit of committee members (See References at the end of this report).

In the final deliberations which resulted in the recommendations contained in this report, the committee reached the consensus that, while they are important considerations, neither coal slurry nor water marketing are the only issues to be addressed. Rather, the fundamental concern of the upcoming Legislature, as well as for many future legislative sessions, is the adequacy of state policies to maximize and reserve for present and future use Montana's fair share of the water in interstate rivers and streams - particularly the Missouri. We do not sell our heritage by marketing 50,000 or 200,000 ac-ft/yr of water. We do let our precious heritage slip away if we fail to adopt legally sufficient policies to protect Montana's present and future interests in the 16.68 million acre feet of water that leave the state through the Missouri and the 26 million acre feet that leave the state through the Clark Fork and Kootenai each year.<sup>16</sup>

The remainder of this report is dedicated to ensuring that Montana and its citizens will have continued control of our water resources. In Chapter 1, the sources and extent of Montana's water resources are reviewed and present and future uses of the water surveyed. In Chapter 2, the development of the water marketing concept is examined as being one manifestation of an important transformation underway in western water law - where both economic and public interest considerations are



competing for importance. Chapter 3 examines the laws and policies that regulate the movement of interstate waters - particularly in the Missouri River Basin. Chapter 4 reviews those relevant features of Montana's water law and policy which influence the water exporting and water marketing issues. Chapter 5 discusses four levels of responses the Legislature might wish to consider during the upcoming or subsequent sessions. Finally, the committee sets forth in Chapter 6 its own set of recommendations for action - both by the 49th Legislature and by subsequent legislatures. Many of these recommendations are contained in HB 680, which has been introduced at the request of the committee (See Appendix D). The committee recognizes that, while these water policy issues are too important and complex to be completely addressed in one 90-day session, the time to lay the foundation for a responsible and assertive state water policy is now.

## CHAPTER 1: MONTANA'S WATER

A consideration of water marketing and water policy requires an understanding of the state's water resources and the projected need for water in the future. In reviewing the information in these categories it is apparent that Montana's water resources and associated needs are as diverse and broad as its landscape. Despite a considerable volume of information derived from federal, state and regional planning studies, the questions about water availability and future needs outnumber the answers. The uncertainties associated with Indian and federal water rights and the incomplete adjudication of pre-1973 water rights are especially troublesome issues.

This section of the report provides a general description of the state's water supplies and the anticipated needs for water in the future. These data provide a broad perspective on the relative demands of different water uses and how these needs may change in the future. The specific impacts associated with the accelerated development of any particular use require a detailed analysis of site specific conditions that extend beyond the scope of this report.

### A. Montana's Water Resources - Sources and Extent of Supply<sup>17</sup>

As a headwaters state, Montana supplies a significant amount of water to two of the nation's largest river systems - the Columbia on the west and the Missouri-Mississippi on the east. A small but important drainage basin near Glacier Park flows north to the Hudson Bay in Canada. The average total annual outflow from the state is approximately 44 million ac-ft of water. The average annual flows of the state's major river basins are listed in Table 1.

#### 1. West of the Continental Divide

The upper Columbia River basin in western Montana is composed of two major river systems - the Kootenai and the Clark Fork. Together these rivers drain approximately 17 percent of the state's land area, but the runoff from this basin is greater than 50 percent of the state's total streamflow.

TABLE 1:  
River Basin Inflow and Outflow (Acre-Feet)

RIVER BASIN	INFLOW	ORIGINATING IN THE STATE	LEAVING THE STATE	% ORIGINATING IN THE STATE
Clark Fork	703,500	15,216,500	15,920,000	95%
Kootenai	7,600,000	2,520,000	10,120,000	25
Missouri	893,600	6,431,400	7,325,000	88
Yellowstone	6,227,000	3,126,000	9,353,000	33
Little Missouri	55,930	132,500	188,430	70
Hudson Bay	0	989,150	989,150	100
TOTAL	15,480,030	28,415,550	43,895,580	65%

Source : Montana Department of Natural Resources and Conservation, **Framework Report**  
(vol. 1, 1976).

Annual precipitation in the region is relatively high, ranging from 15 inches in the valleys to more than 100 inches in the mountains. Approximately 17.7 million ac-ft/yr of water over and above human consumptive uses originate in this region. This volume combined with an average annual inflow of 8.3 million ac-ft/yr from Canada produces an average annual outflow of 26 million ac-ft/yr at the Montana-Idaho border.

A dominant use of the water in the upper Columbia River Basin is for hydroelectric power, a non-consumptive use. For example, the U.S. Corps of Engineers has submitted a water rights claim for 8.2 million ac-ft/yr or virtually the entire flow of the Kootenai River at the Libby Dam. In addition, the hydroelectric plant at Noxon Rapids on the Clark Fork, owned and operated by Washington Water Power, has water rights for 36.2 million ac-ft/yr.

Irrigation is the largest diversionary water use and the largest consumer of water in western Montana. Although irrigation is a relatively minor use in the Kootenai basin, it is an important and increasing water use in the Clark Fork River Basin. Approximately 443,000 acres were irrigated in 1975, but this figure is estimated to increase to 516,400 acres by the year 2000.<sup>18</sup> Past studies have predicted that municipal, rural domestic and industrial water uses will increase only modestly before the year 2000.<sup>19</sup>

The constraints of the existing hydroelectric instream flow rights on consumptive uses by agriculture and other users is a major conflict in this region. There is also potential for conflict between Montana's interest in developing consumptive uses and downstream interests for hydroelectric generation.

## 2. East of the Continental Divide

The large semi-arid area of Montana east of the Continental Divide contains about 83 percent of the state's land area. The average annual precipitation ranges between 12-16 inches per year and water shortages are a frequent occurrence. In much of the region, shallow groundwater serves as the sole source of domestic, rural and livestock needs.

The rivers of this region, including the Yellowstone and the Missouri rivers and their tributaries, are important water resources not only for Montana but also for the entire Missouri River Basin. The average annual outflow of the Missouri River at the Montana-North Dakota border is 7,774,000 ac-ft, and the average annual outflow of the Yellowstone is approximately 8,804,000 ac-ft. Montana contributes about 50 percent of the average annual streamflow at Sioux City, Iowa (21,725,000 ac-ft/yr) and 19 percent of the streamflow at the mouth of the Missouri River (54,559,000 ac-ft/yr). Montana and Wyoming together contribute 76 percent of the streamflow at Sioux City, Iowa, the division point between the upper and lower basin and the starting point for navigation in the lower river. Obviously any major new water diversions in the upper basin will affect water availability in the lower basin.

A major feature of the water resources of the upper Missouri River Basin in Montana is the water stored in reservoirs. There are 38 reservoirs in the basin that have a total storage capacity of 5000 acre feet or more. The largest of these in Montana are Fort Peck (19 million ac-ft total storage area), Canyon Ferry (2.1 million ac-ft) and Tiber (1.3 million ac-ft). Together, the 38 reservoirs have a total storage capacity of more than 25 million acre feet.

The Yellowstone River in Montana receives 6.2 million ac-ft/yr or 67 percent of its total annual flow from tributaries arising in Wyoming. A portion of this water is allocated for Montana's use according to the provisions of the Yellowstone Compact.<sup>20</sup> The compact further protects and allows for full development of water rights existing prior to 1950.

Seven reservoirs in the Yellowstone River Basin in Montana have a combined total storage capacity of more than 1.5 million ac-ft. The largest of these, Yellowtail Reservoir on the Big Horn River, has a total capacity of 1,375,000 ac-ft.

#### B. Present Uses of Water in Montana<sup>21</sup>

In passing the Montana Water Resources Act of 1967, the Montana Legislature mandated the preparation of a state water plan. The Department of Natural Resources and Conservation, in cooperation with



federal agencies began river basin planning in 1972; and since that time major studies have been completed on the Flathead, Clark Fork, Yellowstone and Upper Missouri River basins. These and other special studies are the basis for current information on water use and water availability.

Many uses of water are not measured and estimates of quantities are often based on other related parameters. Although techniques for measurement and estimation have improved, it is generally recognized that water use data are subject to considerable error.

Beneficial uses of water are classified as either withdrawal uses or instream uses. The major instream use in Montana is for hydroelectric power generation, but fish and wildlife habitat, recreation, and water quality enhancement are also recognized and protected instream uses. Water diverted or withdrawn from its source and returned with little or no depletion is a non-consumptive use. These waters may be reused many times within a basin. Consumptive uses result in a depletion of the supply because part or all of the diverted water is not returned to its source. Consumed water is generally lost through evaporation or by incorporation into a crop or other product.

Table 2 provides a summary of the most recent estimates or measurements of water use in Montana according to major river basins. A total of 15,750,000 ac-ft of water is diverted annually for offstream, use and an additional 73,985,000 ac-ft are used instream for hydroelectric power generation. The annual consumption of water in Montana is estimated to be 7,296,000 ac-ft, of which 54 percent or 3,925,000 ac-ft is lost due to evaporation from reservoirs and surface impoundments.

#### 1. Agricultural water

Irrigated agriculture uses 98 percent of all water diverted in Montana and approximately 45 percent is lost due to consumption. According to 1981 data, there are 2,800,000 acres of land under irrigation, which ranks Montana fourth largest in the Missouri Basin states and seventh in the nation.<sup>22</sup>

TABLE 2:  
Comparison of Water Use in the  
Major River Basins in Montana (1980)  
(1000 ac-ft/yr)

BASIN	HYDRO POWER	THERMO POWER	SELF- SUPPLIED	PUBLIC WATER	RURAL DOMESTIC	IRRIG. AGRIC.	LIVE- STOCK	BASIN TOTAL
KOOTENAI								
Withdrawn	6,728	13	15	2	1	40	0	6,799
Consumed	0	0	2	1	1	13	0	17
CLARK FORK								
Withdrawn	27,611	0	33	46	5	2,006	3	29,704
Consumed	0	0	5	17	5	534	3	564
MISSOURI								
Withdrawn	37,265	0	3	71	7	8,627	16	45,989
Consumed	0	0	1	25	7	1,787	16	1,836
YELLOWSTONE								
Withdrawn	2,381	94	11	38	3	4,707	9	7,243
Consumed	0	9	1	15	3	917	9	954
STATE TOTAL								
Withdrawn	73,985	107	62	157	16	15,380	28	89,735
Consumed	0	9	9	58	16	3,251	28	3,371

Note: (a) Hydroelectric power generation does not withdraw water, but these values are included to provide a comparison of all water uses.

Source: Montana Department of Natural Resources and Conservation (unpublished data 1984).



Under the Pick-Sloan Missouri Basin Plan, authorized by the 1944 Flood Control Act,<sup>23</sup> more than a million acres were planned for irrigation development in Montana, but only 47,782 acres (5 percent) have received service under this federal program. Although development has been slow, Montana is still entitled to water for developing these lands. In a review of the Missouri-Yellowstone River basins, the DNRC has estimated that an additional 9 million acres of land are irrigable (6.98 million in the Missouri River Basin and 2.18 million in the Yellowstone River Basin).<sup>24</sup>

These estimates clearly indicate that Montana agriculture may benefit from additional irrigation systems; but there is a need for a more detailed analysis of irrigable acreage based on a critical review of soil types, available water and economic feasibility. These refined values are necessary to better define future water needs and to plan for water development.

## 2. Thermoelectric power generation

Thermoelectric power generation water use refers to water used to cool power generating facilities. The data (Table 2) are based on a survey conducted in 1980 of the eight operating thermoelectric facilities in Montana. All of the water used for these facilities is from surface sources. Approximately 80 percent of water used for this purpose occurs in Yellowstone and Richland counties.

The consumptive use of water for cooling thermoelectric power plants depends on the type of cooling process used. Closed cooling systems which are used on all operating plants in Montana consume much less water than open cooling systems.

## 3. Self-supplied industries

Self-supplied industries are manufacturers that obtain their water directly from surface or groundwater sources; this does not include commercial establishments or institutions such as schools, hospitals or restaurants. The values are based on data from surveys conducted by questionnaire and from estimates. The major water-using industries in Montana are petroleum refining, chemical manufacturing, wood products manufacturing, sugar refining and primary metal manufacturing

industries. Approximately one-half of self-supplied industry water is obtained from groundwater.

#### 4. Public water supply

Public water supply refers to water withdrawn by a publicly or privately owned water supply system. The water is used for domestic purposes, commercial and industrial, and general municipal purposes. Approximately 75 percent of the 1980 Montana population obtained water for domestic use from public water supplies.<sup>25</sup> Although a portion of these data are based on actual measurements of water used, some smaller communities do not require water meters and the data are estimates based on population and average per capita consumption. The source of water may be from either ground or surface water supplies.

#### 5. Rural domestic

Rural domestic water includes self-supplied domestic uses such as drinking and sanitary water, domestic-stock water, and lawn and garden irrigation. Most rural domestic supplies are for farms and ranches, but there are five incorporated towns in which individual uses are entirely self-supplied.

The values for rural domestic water use are estimated, based on per capita consumption and population census figures. It is estimated that more than 90 percent is obtained from groundwater sources.

#### 6. Livestock

All water used in the production of livestock is included in this category, but the loss of water due to evaporation from stock water ponds is not included. These values are estimated from data on county livestock populations and per capita livestock water requirements. Approximately 55 percent of livestock water is estimated to be supplied from surface water and the remaining uses are from groundwater sources.

#### 7. Instream flows

The 1973 Water Use Act specifically recognized fish, wildlife and recreation as beneficial uses of water.<sup>26</sup> Through the water reservation process<sup>27</sup> these values can be protected by establishing and maintaining the minimum stream flows necessary to sustain and enhance these

resources. Minimum instream flows are also necessary to maintain the necessary water quality to protect other water uses, including uses for public health and safety.

Water reservations for instream flows have been established on the Yellowstone River and its tributaries; the instream reservations above Billings total 3.7 million ac-ft/yr at Billings and 5.4 million ac-ft/yr below Billings at Sidney. Instream water reservations above Billings have senior priority.

Although water reservations have not been established in other river basins, the Department of Fish, Wildlife and Parks is preparing applications for instream flow reservations on the Upper Clark Fork and the major tributaries that form the headwaters of the Missouri River.

The Select Committee on Water Marketing has heard considerable public comment urging that water reservations be completed on all major river basins of the state. (See Appendix A)

It is also noted that studies have been completed to establish the minimum instream flows for 149 miles of the Missouri River that have been designated as the Upper Missouri National Wild and Scenic River, administered under the provisions of the National Wild and Scenic Rivers Act.<sup>28</sup> The Bureau of Land Management, as the responsible federal agency, has announced it wishes to enter negotiations with the Reserved Water Rights Compact Commission<sup>29</sup> on the amount of water that would be reserved for instream purposes in this section of the Missouri River.

#### 8. Hydroelectric power generation

Water which is diverted through turbines to generate electricity is often considered as an instream use. Major hydroelectric facilities on rivers usually do not divert water away from the stream as is sometimes required for smaller hydroelectric facilities. The values presented in Table 2 are listed as diverted water for the purposes of comparison with other uses. The values listed for each basin are cumulative quantities, representing the sum total of water used and reused by all hydroelectric facilities within the basins. The values do not represent the total amount of water available in these basins. Although hydroelectric power generation does not result in water consumption (depletion), the loss of

water due to evaporation from reservoirs represents the single greatest depletion of water in Montana.

Water required for hydroelectric generation has an important impact on future consumptive uses in Montana. In the Columbia River Basin existing hydropower rights have largely restricted the opportunity for new irrigation development or other consumptive uses. On the Upper Missouri River, the existence of water rights associated with Canyon Ferry and the series of Montana Power dams could eventually close the upper basin above Great Falls to future consumptive uses.

#### 9. Energy-industrial

The large demand for industrial water that was experienced in the 1970s has diminished in Montana. At one time, numerous coal fired generation plants, synfuel plants, and coal slurry lines were expected to impact severely water supplies in the Yellowstone and Missouri River basins. One energy demand study estimated industrial water requirements of 2.6 million ac-ft/yr in the Yellowstone River Basin; recent projections by the DNRC indicate energy industry depletions of 375,000 ac-ft/yr or less by the year 2000.

#### C. Coal Slurry<sup>30</sup>

House Bill 908 directed the Select Committee on Water Marketing to specifically consider coal slurry as a potential industrial use of water with particular attention given to its potential economic and environmental impacts.<sup>31</sup> Since the passage of HB 908 the immediate concerns about coal slurry have diminished and the committee has emphasized broader policy issues. The committee has considered, however, the question of coal slurry as described in this section.

Among the more controversial and persistent proposals for industrial water use has been that for coal slurry. Coal slurry pipelines represent an alternative to transporting coal by rail. Since 1962, the concept has been promoted as a means to reduce the cost of coal transportation over long distances. Although there are no currently active plans for coal slurry in the region, there are continued reports that various entities are considering this possibility. For example, Shell has continued to express an interest in



a coal slurry line from Montana coalfields to the West Coast, along the route of the previously proposed Northern Tier Oil Pipeline.

Transporting solids in slurry form is supported by a substantial technology and is backed by the experience of many existing commercial installations that transport iron, copper, phosphate concentrates and limestone over long distances. Indeed, researchers are continuing to find improved slurry methods including the use of other liquids as a slurry medium (e.g., liquid carbon dioxide, oil, methanol).

Coal slurry involves pulverizing coal with water to a maximum particle size of about one-eighth inch and further mixing with water to form a mixture of approximately 50 percent coal by dry weight. The slurry mixture is stored in agitator tanks to prevent settling and subsequently is introduced into pipes and propelled by pumps located at 50 to 150 mile intervals. The pipeline which may range from 15 to 36 inches in diameter is normally buried several feet below ground. Pumping stations must also have storage tanks or ponds of sufficient size to remove water and slurry from a section of pipe in the event that slurry delivery is temporarily interrupted. At the terminal, the water and coal are separated by settling, centrifugation or vacuum filtration. The reclaimed water may be used for cooling in thermoelectric plants or treated and discharged as waste water. Other possibilities include the direct use of the slurry in a gasification or liquefaction process or, if a combustible medium is used, to fuel a boiler directly.

The quantity of water required for coal slurry is approximately 50 percent mixture by weight, depending on the moisture content of the coal. One estimate for Montana coal would require about 830 ac-ft of water for every million tons of coal transported; a 36 million ton per year facility, operating at 90 percent efficiency, would thus require approximately 30,000 ac-ft of water per year.<sup>32</sup>

Despite the available and apparently improving technology, only one coal slurry pipeline is presently operational. The Black Mesa Pipeline completed in 1970 carries 4.8 million tons of coal per year along a 273 mile route from Arizona to Nevada. A coal slurry pipeline did operate from 1957 to 1963 in Ohio between a mine at Cadiz and the East Lake



Power Station. It was shut down when unit trains undercut pipeline rates.

In the 1980s plans for at least twelve different coal slurry pipelines have been made public within the contiguous United States. Five plans called for the transport of Montana and Wyoming coal to markets in the South (Texas and Arkansas), the Midwest (Minnesota and Wisconsin) and the Northwest (Oregon and Washington). Two coal slurry companies, the Powder River Pipeline Company and Energy Transportation Systems, Inc. (ETSI) have recently announced cancellation of their plans. Shell has indicated a continuing interest in transporting coal to the Pacific Northwest. It has been suggested that a fluid other than water might be considered as a transport medium for this system.

Major issues in the coal slurry debate have concerned the granting of eminent domain to pipeline companies and the preservation of western states water rights in relation to the interstate commerce provisions of the Constitution. Legislation introduced during the past session of Congress which would have provided both was defeated during 1984.<sup>33</sup>

The failure of coal slurry legislation in Congress has apparently dampened the interests of coal slurry proposals, but it seems likely that new efforts will be re-established in the future. The ETSI pipeline had succeeded in securing right-of-way easements, despite the blocking efforts of railroads. Railroad competition for markets and legal questions regarding a water supply, however,<sup>34</sup> were problems that remained when ETSI terminated its plans in 1984.

Pipeline opponents have expressed concern about the potential economic impacts of coal slurry on railroads, potential environmental impacts and the likelihood that agricultural water uses will be forced out of business by the higher prices paid for industrial water.

Satisfactory answers to those concerns are difficult to find because they are dependent upon site specific factors. Except for the environmental impact statement prepared for the proposed ETSI pipeline,<sup>35</sup> most data are based on hypothetical proposals that require simplifying assumptions and considerable speculation about the future.

One study conducted by the U.S. Congress, Office of Technology Assessment,<sup>36</sup> reached the following general conclusions:

- o Coal slurry pipelines do represent, under some specific circumstances, the least costly available means for transporting coal measured in economic terms. Whether this is true of any particular pipeline can only be determined by detailed evaluation of the conditions specific to the route.

- o The development of a substantial slurry pipeline industry is likely to diminish the growth in future revenues of competing railroads, primarily in the West, unless rates paid by remaining shippers are adjusted to compensate.

- o The introduction of coal slurry pipelines may affect the regional pattern of coal mining and distribution in such a way as to expand the use of western coal to greater distances from this area of origin.

- o Pipelines employ less labor than does rail over their respective lives, but employment by a substantial pipeline industry would probably offset cumulative impacts on the rail industry for the rest of the century.

- o Agriculture may be affected locally by impacts on water availability and the costs and quality of service by railroads.

- o Sufficient unused quantities of suitable water are physically present but not necessarily legally available for the operation of several slurry pipelines from western coal producing areas.

- o The primary environmental choices between coal pipelines as opposed to increased rail transportation involves water use and temporary construction activity of pipelines versus noise, land use disruption and inconvenience of increased train traffic. Other impacts were considered roughly equivalent for both modes.

One study of coal slurry has been conducted to evaluate the feasibility of industrial water sales from the Tongue River Dam project in Montana.<sup>37</sup> Some conclusions of this study, as presented to the Select Committee on Water Marketing, were as follows:

- o The market for western coal has been substantially reduced due to a declining demand for electricity and more stringent air emissions standards imposed by the federal government.

- o Coal slurry can effectively compete with railroads, especially if current rail rates continue to increase.

- o Recent shifts from short (a few years) to long term rail contracts (up to 20 years) has substantially reduced the opportunity for coal slurry to compete for existing markets. Coal slurry must depend on new markets which are not likely to develop in the near future.

- o Eminent domain is needed by pipeline companies to reduce the cost and time necessary for construction.

In conclusion, most studies have shown that coal slurry pipelines are technically and economically feasible - at least at some time in the future. The impacts of coal slurry on the local economy and the environment, however, are highly site specific and should be based on evaluations of specific proposals. A more immediate concern for Montanans involves the legal and political ramifications of using water for this purpose.

#### D. Anticipated Water Uses<sup>38</sup>

Detailed projections of future water needs have been developed for all of the major river basins in Montana. In each study the projections are based on assumed or expected changes in socio-economic and demographic conditions. The uncertainties of these changes complicate the planning process. New data, new technology and changing economic conditions require continuous adjustments in the projected figures.

One major source of variation in the projections is the lack of firm data for existing uses. For example, water for irrigation is a major use in the Missouri River Basin but firm data on irrigated and irrigable acres has not been available. As current studies are completed the past estimates can be revised.

Most studies have overestimated future water needs based on optimistic future events that would encourage greater water use. Changing technology and economic conditions may greatly modify water demands and require that projections be revised. For example, the

anticipated high demand for water to meet energy developments in Montana has not occurred or at least has been delayed.

To account for the uncertainties in the basic assumptions, water planning must rely on multilevel projections with consideration given to both near- and long-term needs. Despite these efforts, projections of future events for large areas of land and water can only provide planning guidelines.

A projection of water needs for western Montana indicates the greatest potential demand is for irrigated agriculture. The DNRC has estimated irrigation needs will increase from approximately 729,000 ac-ft/yr in 1975 to more than one million ac-ft/yr in the year 2020. Most of the increased development is expected in the Clark Fork River Basin with lesser amounts in the Flathead and Kootenai drainage.

Only moderate increases are forecast for other water uses. Municipal water use is projected to increase due to population growth from about 79,400 ac-ft in 1980 to about 113,000 ac-ft in 2020. Rural domestic needs are expected to be met by expanding municipal systems and may even decline in the next century. Industrial water needs are estimated to increase with population growth. Considering only municipal, rural domestic and industrial water needs the quantity needed is expected to rise from 83,000 ac-ft in 1970 to 113,000 in the year 2000 and 131,500 ac-ft/yr in 2020.

Water needs in eastern Montana have been projected for the upper Missouri River Basin and in the Yellowstone River Basin. In each study area several alternative plans for future development were considered including development without specific plans. Each of the plans estimate water needs based on specific economic and environmental objectives. For the purposes of this report, water needs are based on projections without a specific plan or a continuation of existing conditions.

Approximately 1.5 million acres are irrigated in the upper Missouri River Basin. Under current trends, the irrigated lands are expected to increase by 132,000 acres by the year 2000. This represents a 10 percent increase in irrigated land.



An abundance of cheap irrigation water in the past has encouraged the practice of excessive and inefficient irrigation. The poor management of irrigation water results in seasonal shortages on almost half the irrigated acres. Even a slight increase in efficiency could supply much of the projected future needs.

Livestock water depletion in 1975 amounted to 24,000 ac-ft; approximately 50 percent of this use is supplied from groundwater. In the year 2000 this use is expected to consume 27,400 ac-ft/yr.

Municipal and rural domestic supplies represent a relatively insignificant impact on surface water supplies in eastern Montana. Approximately 90 percent of the population is supplied by groundwater. The demand is expected to increase from 63,000 ac-ft in 1970 to 80,000 ac-ft/yr in 2000.

The demand for other water uses has not been projected. Industrial water needs (non-energy industry) are expected to show slight increases depending on economic and environmental considerations. Energy industrial needs in the upper Missouri are primarily tied to hydroelectric plants. These facilities do not consume water directly but evaporative losses from impoundment surfaces exceeds all other consumptive uses. The demands for water to develop or process fossil fuels may be an important need in the future.

The water resources of the Yellowstone River Basin are shared with Wyoming and governed to a large extent by the Yellowstone River Compact. Even more importantly the use and anticipated water needs are tied to the water reservations established on the Yellowstone River in 1978.

The projected water needs for the Yellowstone River Basin have been considered in several studies. The Draft Environmental Impact Statement for Water Reservation Applications prepared by the DNRC in 1976 provides estimated water demands through the year 2000 based on alternative plans emphasizing either irrigation, energy, instream flows or no action. The Yellowstone River Basin Adjacent Coal Area Level B Study conducted by the Missouri River Basin Commission provides projected water demands for each of seven sub-basins and for each of several alternatives and



specific objectives. The uncertainties of energy development have required many adjustments in the projected water demands for this basin.

E. Water Available for Water Marketing<sup>39</sup>

The water resource parameter of direct importance to this study is water availability - the quantity of water available for future beneficial uses after all other existing rights are satisfied. The obvious importance of documenting this information was recognized by the Legislature in passing the Water Use Act of 1973, which required the adjudication of all pre-1973 water rights<sup>40</sup> and established the Reserved Water Rights Compact Commission to negotiate Indian and federal reserved water rights.<sup>41</sup> Until these rights are clearly defined the quantity of water available for future appropriation must necessarily depend on estimates.

Several water resource specialists reported to the committee on the availability of water according to the major river basins.<sup>42</sup> Water for industrial purposes is considered as available from Fort Peck Reservoir on the Missouri River and the Yellowtail Reservoir on the Big Horn River in the Yellowstone River Basin.

On the basis of a programmatic environmental impact study,<sup>43</sup> the Bureau of Reclamation concluded that one million ac-ft of water was available for industrial water use from the mainstem Missouri River Basin. As a result of this study, the Department of Natural Resources and Conservation signed a contract with the Secretary of Interior to use 300,000 ac-ft of stored water in Fort Peck Reservoir for potential industrial purposes.<sup>44</sup> The contract provides that, subject to existing rights including those of Indian tribes, the DNRC may subcontract to industry for industrial water purposes, including but not limited, to coal slurry. The contract became effective in September 1976 and continues for a period of 40 years.

In 1983 on the basis of an environmental impact study,<sup>45</sup> the Bureau of Reclamation declared the availability of industrial water service contracts for use of up to 300,000 ac-ft annually from Yellowtail and Boysen reservoirs. The water was declared available for coal-related

industrial and associated municipal use in northeastern Wyoming and southeastern Montana.

At the present time, one contract has been completed for 6000 ac-ft of water annually with the Montana Power Company for use in its Colstrip power complex.

Under the provisions of HB 908,<sup>46</sup> the DNRC has negotiated for a memorandum of understanding with the Bureau of Reclamation that would authorize contractual arrangements for marketing Yellowtail Reservoir water in the same manner as now exists for Fort Peck.

CHAPTER 2: THE TRANSFORMATION OF WESTERN WATER LAW AND POLICY:  
THE ADVENT OF WATER MARKETING

For those living in the West over the last two decades, it seems as if the energy crisis of the 1970s has been replaced by the "water crisis" of the 1980s. Once again, western resources are the subject of regional and national attention. Once again, westerners are subjected to a chain of rapidly breaking events that they do not fully understand, orchestrated by persons and organizations they do not know. Once again, westerners fear they are no longer in control of the forces that affect the allocation of their natural resources, and their way of life.

Yet, upon careful analysis, one realizes a very different transformation is underway. Unlike the energy crisis, which was precipitated by international events, the water problems of the West are generally of our own making. Where the energy crisis was the result of regional plenty in the midst of national scarcity, the West's water problems are the result of widespread scarcity of the resource. And where the energy crisis produced a whole set of federal "solutions," the federal government, for the most part, is giving western states ample responsibility for developing solutions to their water problems.

The transformation in western states water law, policy, and institutions in response to the water crisis has been very rapid and very real. This chapter is an abbreviated account of that transformation. It reviews the four major forces which are the catalysts of change: (a) demographic and economic changes in the West; (b) the removal of restraints on the interstate movement of water; (c) the growing influence of economics on water policy; and (d) the increasing recognition of public rights in water. The chapter concludes with an examination of how each of these forces has been manifested in Montana.

A. Demographic and Economic Changes in the West

The West continues as the most rapidly growing region of the country. Thirteen of the 14 western states exceeded the national

average percentage growth during the 1970-1980 decade. In recent reports, California, Arizona, and Colorado are ranked 10th, 8th, and 7th in growth rate nationally. Although growth has slowed because of the regional energy glut, even states with small populations like Wyoming and Utah have shown dramatic population increases in recent years. In 1980, the population of the western states was approximately 43.8 million; in 2000, it is predicted to be 63.2 million,<sup>47</sup> a 44 percent increase.

Growing population has been accompanied by fundamental changes in the western economy and culture. The West is being transformed from a rural, agrarian, and hard-rock mining culture into one that is more urban and semi-urban; dependent on high technology, service and extractive energy industries; and concentrated on very arid landscapes. Shifts in water usage are paralleling these economic and social changes, especially in the Southwest. In some states (although probably not Western) agricultural water is being shifted to these municipal and industrial uses as a result of the conversion of agricultural lands to urban development, of deliberate state policies to phase out water-intensive agriculture in the Southwest (e.g., Arizona's groundwater statute<sup>48</sup> which represents a decision by the state to favor urban and mining uses of water over agricultural uses), or in response to the economically higher value of water when used for domestic or industrial purposes (e.g., \$4.97-81.20/ac-ft for irrigated water v. \$261.80-368.63 for municipal water<sup>49</sup>). With greater frequency, urban water planners are looking beyond local and state boundaries for potential sources of water. Together the demographic and economic forces provide a strong impetus for the interstate movement of water, a development discussed in the next section.

#### B. Removal of Restraints on the Interstate Movement of Water

Intrastate movement of water has been a commonality in western water management since the development of irrigation canals in Idaho and other states during the 1800s. Today, many urban populations depend on long-distance movement of water to meet growing needs, whether it is water from the Owens Valley or Lake Shasta to Los Angeles, from Hetch



Hetchy to San Francisco, from the Colorado River to Phoenix and Tucson, or from the western slope to Denver. Also, much of western agriculture depends on shipments of water.

Although the intrastate movement of water has been frequent, western water managers generally were confident that states could prevent the exportation of water outside state borders. These managers and others were caught unaware when in July 1982 the U.S. Supreme Court decided Sporhase v. Nebraska.<sup>50</sup> The result of that decision has been to greatly facilitate the interstate movement of water.

Sporhase and Moss, who owned adjoining farmland in Colorado and Nebraska, applied to Colorado for a permit to irrigate with groundwater, but the state denied the permit based on a serious groundwater depletion problem. Without State of Nebraska approval, the landowners placed their well in Nebraska and transferred water into Colorado. The state secured an injunction against Sporhase and Moss on the basis that they had violated a Nebraska statute<sup>51</sup> which prohibited the export of groundwater unless the state director of natural resources found the withdrawal to be reasonable, not contrary to the conservation and use of groundwater, and not otherwise detrimental to the public welfare. The statute also prohibited the export of groundwater unless "the state in which the water is to be used grants reciprocal rights to withdraw and transport groundwater from that state for use in the State of Nebraska."<sup>51</sup> In reversing the decision of the Nebraska Supreme Court () and thereby declaring the statute to be unconstitutional, the U.S. Supreme Court viewed this reciprocity provision of the Nebraska statute as an undue burden on interstate commerce.

Significantly, the Court rejected Nebraska's argument that the water was owned by the state in its sovereign capacity and held that, in fact, water is an article of commerce. State ownership is, therefore, a legal fiction and cannot be used to limit Congressional power.

The Court, in its review of the provisions of the Nebraska statute, drew a distinction between those which were facially violative of the commerce clause and those that were not. The reciprocity requirement was facially discriminatory because it acted as a complete ban on



exporting water to Colorado - whether or not such exportation could be shown as damaging to the state. The other features of the statute, because they provided for a determination concerning actual water conservation needs, furthered legitimate state purposes in preserving diminishing groundwater supplies and, therefore, were not facially violative of the commerce clause. Even if such conservation provisions act to limit the interstate movement of water, they can be upheld for four reasons:

- (1) state regulation of water is at the core of the police power;
- (2) states, including Nebraska, have had a legal expectation, fostered by congressional acts and judicial decrees, that they may restrict water within their borders;
- (3) state ownership claims may be "fictitious" but they are sufficient to support a limited preference for a state's own citizens; and
- (4) states have acquired additional rights for water within their borders due to their continuing conservation efforts.<sup>54</sup>

In particular, the Court strongly suggested that if Nebraska had presented evidence that it was a particularly arid state requiring a rough equivalence between imports and exports of water, and that intrastate distribution in the state attempting to import was feasible regardless of the distances involved, the reciprocity requirement might also have survived the test. Since 1982, the Nebraska Reviser of Statutes has modified the statute to eliminate the language declared unconstitutional by the Court.<sup>56</sup>

The U.S. Supreme Court decision in Sporhase has been refined by the U.S. District Court in New Mexico in El Paso v. Reynolds.<sup>57</sup> The City of El Paso, Texas, had filed 326 applications with the New Mexico State Engineer to appropriate 296,000 ac-ft/yr of groundwater in New Mexico for municipal use in El Paso. The state engineer denied all of the applications on the grounds of an absolute statutory embargo on groundwater exportation.<sup>58</sup> In the subsequent litigation brought by El Paso, Judge Howard Bratton declared the embargo statute to be unconstitutional. A new statute passed in response to the court's

decision provides for exportation under "appropriate circumstances,"<sup>59</sup> was upheld in its major features on August 20, 1984.<sup>60</sup> Yet, the underlying principle was reiterated: the interstate movement of water cannot be banned outright.

These decisions have called into question all absolute bars on the interstate movement of water - even those contained in interstate compacts preventing the exportation of water outside the signatory states. The decisions have also made credible the plans for major projects, such as coal slurry pipelines, which depend on the interstate movement of water. We have previously discussed the proposal of Energy Transportation Systems, Inc. (ETSI) to purchase 50,000 ac-ft/yr of water from South Dakota for use in a coal slurry pipeline extending from Gillette, Wyoming, to Arkansas and Louisiana. Another project, proposed by the Powder River Pipeline Company in 1982, anticipated the construction of a coal slurry pipeline from the Decker, Montana, area to the Great Lakes using water from the Yellowstone River, Fort Peck Reservoir, the Powder River, or some other source. Both of these projects have been cancelled, however, as the result of litigation, the defeat of the eminent domain legislation for pipelines in Congress, and the current depressed economics of coal.

### C. Influence of Economics on Water Policy

For many years, some natural resource economists and observers have complained that most Americans hold fundamentally mistaken notions about water. For one, we have assume that water supplies are unlimited and therefore can readily be brought to us at little or no cost. For another, we have a "headwaters" mentality - i.e., we act as though we were upstream from everyone else so what we did with the water (including adding pollutants) did not matter.

The past decade has indicated the fundamental error of both calculations. Water is a limited resource (and, in the West, a scarce one). And, as we have seen from the widespread pollution of our lakes and waterways, we are always downstream from some other water user.

Westerners and other Americans have thus become very conscious of the cost of adequate supplies of clean water. We are now paying the

price for the cleaning up of many waters and protecting these from future contamination. Also in many instances users must now pay the full price for delivered water where before, because of national policy, the price was subsidized.

In western states, we are being asked to pay a greater share - in some cases, the entire share - of water development projects. During the late 1970s and early 1980s, there was a period of no new authorizations of federal water projects. This occurred in part because of uncertainty concerning state cost-sharing requirements. Even states such as Wyoming, which appropriated \$200 million in an effort to accelerate the construction of state/federal projects, have been frustrated by delays.

The removal of state barriers to the interstate movement of water has accentuated the economic transformation of western water. With the removal of such constraints, we are now observing the first signs of what may become a regional water market where water may flow, in many cases uphill, to the highest bidder. To an increasing extent, water will be allocated by market forces and not through the permit system of a state agency. Only recently, San Diego announced that it had obtained options from Louisiana brokers for the purchase of water rights on the Upper Colorado River. It was also rumored that Utah's outgoing Governor Scott Matheson would propose water marketing legislation to the 1985 Session of the Utah Legislature.

Many economists acclaim this development. Through economic allocation, they argue, more efficient use will be made of water. Increasing prices will provide incentives for conservation - a very important feature in the water-scarce West.

Other observers are more circumspect: in spite of the Supreme Court, water is different from other commodities. In many places in the West, water is invested with "community" importance. Water has "social, cultural, political, and symbolic value[]...that give[s] it an importance beyond the value that it established in the marketplace."<sup>61</sup> The challenge to western decisionmakers will be to develop policies



responsive to the necessity of market forces while protective of the important cultural values dependent upon water.

#### D. Public Rights in Water

Even while judicial decisions and growing scarcities have combined to speed the market allocation of water, another line of court cases has firmly recognized public rights in certain waters (whether appropriated or not). Those cases, based on the public trust doctrine, seek to protect public uses and access to and upon navigable waters for passage, commerce, and fishery. Although the doctrine evolved with reference to navigable waters and to the public's economic and subsistence uses, the rationale behind the doctrine has been applied to cover other "common heritage" resources and to guard more contemporary uses such as scientific inquiry and recreation. Most importantly, the public trust doctrine requires a high level of care (in essence, a fiduciary obligation) on the part of government as it manages and develops policies pertaining to the resource.

National Audubon Society v. Superior Court (Mono Lake),<sup>62</sup> decided by the California Supreme Court in February 1983, is recognized as the premier public trust case. The facts of Mono Lake are the water history of Los Angeles itself. In 1913, Los Angeles completed its first aqueduct from the Owens Valley to the east and eventually dried up Owens Lake. In 1933, the city applied for and in 1940 received a state permit to divert unappropriated waters in four of the five tributary streams serving Mono Lake lying east of Yosemite. The state agency knew environmental damage would occur from granting the water permit, but the agency believed that it had no authority to prevent or minimize that damage. For the next 20 years, however, Los Angeles made little use of these waters.

In the early 1960s, the state warned Los Angeles that its Mono Lake right would have to put to use or would be lost. By 1970, Los Angeles completed a second aqueduct to the Owens Valley enabling it to take its full Mono Lake entitlement. The result has been that, over the last ten years, the surface of the lake has diminished by about 30 percent and the surface level has dropped approximately 40 feet. The brine shrimp

of the lake, upon which numerous bird species depend, have been threatened by increased salinity. The birds, including a large breeding colony of California gulls, have also lost safe habitat as a once-protected island has become connected with the main shore. Air quality has deteriorated as alkaline flats become exposed to the wind.

In its decision, the California Supreme Court held that the public trust doctrine applied in the case so as to protect the navigable waters of Mono Lake from harm caused by diversion of non-navigable tributaries. The doctrine protects changing public needs for ecological preservation, open space maintenance, and scenic and wildlife needs - as well as the traditional concerns of navigation, commerce, and fishing. The state, as public trustee, has a continuing duty to protect the people's common heritage of streams and lakes through continuing administration of the trust.

Many observers feel Mono Lake signals an important integration of public trust considerations with the prior appropriation doctrine which is recognized in California, Montana, and other western states.<sup>63</sup> Thus read, water rights cannot be acquired independently of public trust considerations; rather they never vest and periodically should be reconsidered on a public interest basis. The implication of this doctrine for western policymakers is the challenge of over-laying public trust considerations on a water allocation system progressively more governed by economic forces.

#### E. Montana Manifestations

Montanans have seen evidence of each of the preceding trends. In large part, their confluence resulted in the water marketing proposals before the 1983 Legislature.

While Montana has not had the economic and population growth of other western states, the state has certainly witnessed rapid energy development and other uses which require intensive uses of water. With the removal of state restraints on the exportation of water, Montana, as a water-abundant headwaters state, would be central to the marketing of water in the region, and other potential customers are not far beyond its borders. The proposed Powder River coal slurry pipeline from



Decker, Montana, to the Great Lakes was cancelled after the failure of eminent domain legislation to pass the Congress. Utilizing a pre-1973 "use" water right to 80,000 ac-ft/yr of Yellowstone River water, a subsidiary of Tenneco is in the business of selling water (and can do so interstate since Sporhase and the temporary repeal of MCA § 85-1-121). Frannie, Wyoming, proposes to drill a well in Montana for municipal water. Some observers believe southern Alberta will thirst for water to irrigate its crops.

Montana has also been hurt by the cutback in funds for federal water development. In spite of the Pick-Sloan assurances that upper basin states would be compensated for inundated bottomlands through construction of other irrigation projects, all of the projects planned for Montana have been deauthorized. It is becoming increasingly clear that, if Montana is to have significant water development, it may have to go it alone. Specifically, enlargement of the Tongue River Reservoir is one project which the state will probably have to build on its own.

This realization, coupled with increasing freedom in the interstate movement of water and South Dakota's attempt to profit from water which had previously flowed through Montana, resulted in serious consideration of water marketing during the 1983 Montana Legislature. The Schwinden Administration supported a limited water marketing program of 200,000 ac-ft/yr of stored, surplus water for in- and out-of-state industrial and other uses.<sup>64</sup> Several bills (e.g., HB 893 and HB 894) were introduced incorporating similar proposals. While no marketing program was adopted, the Legislature did provide for this water marketing study (HB 908).

The water marketing discussion at the 1983 Legislature also coincided with the release of A Water Protection Strategy for Montana: Missouri River Basin (the "Trelease Report"), prepared by Wright Water Engineers, Inc., and Frank J. Trelease for DNRC. The study had been mandated by HB 709, passed during the 47th Legislature to "develop a strategy to protect Montana's water from downstream uses and insure water availability for Montana's future needs...."<sup>65</sup> As one of its recommendations, the report suggests water marketing as a possible means

to fund water development which the authors feel to be of critical importance in securing Montana's fair share of the waters of the Missouri River Basin.<sup>66</sup> The report also contains much more depth and many other thoughtful recommendations. In particular, the report sets forth "an in-depth study of the nature, scope, and timing of potential Missouri Basin water conflicts."<sup>67</sup> This study includes an analysis of the means to achieve an interstate water apportionment, an evaluation of Montana's water programs as they enable the state to maximize its fair share of the basin's water, and a suggested six-part strategy for Montana to undertake in achieving a Missouri River Basin water allocation. This strategy suggests:

1. Relying on the 1944 Flood Control Act as an allocation of Missouri River water;

2. Monitoring activities which threaten the 1944 Act and the O'Mahoney-Milliken Amendment;

3. Monitoring other activities which threaten Montana's water development;

4. Encouraging conflict resolution;

5. Preparing for the eventuality of a new water allocation in the basin by

- a. documenting existing water rights and uses;

- b. quantifying Indian and federal reserved water rights;

- c. resolving Yellowstone River Compact issues;

- d. developing a centralized water resource management system;

- e. planning and establishing future claims to water; and

- f. creating an advisory council to identify and resolve water policies and issues; and

6. Developing water uses in Montana by

- a. promoting federal water projects;

- b. perfecting water reservations;

- c. developing state water projects;

- d. assisting Indian water development;

- e. assisting private water development; and
- f. identifying and considering additional sources of funding.<sup>68</sup>

Additional details concerning these recommendations as contained in Table 3 or in the later discussion of alternative strategies for the state set forth in Chapter 5 (pp. 5).

Finally, the public trust doctrine has also made its appearance in Montana. In both Montana Coalition for Stream Access v. Curran (Dearborn River),<sup>69</sup> decided May 15, 1984, and Montana Coalition for Stream Access v. Hildreth (Beaverhead River),<sup>70</sup> decided June 21, 1984, the Montana Supreme Court has recognized the doctrine for the first time in holding that the public is entitled to recreational use of all of Montana's waters that are capable of such use. Further application of the doctrine is presently before the Court in Department of State Lands v. Pettibone,<sup>71</sup> where the issue is whether water rights appurtenant to state school trust lands vest in the lessees of those lands or in the state as the owner of the land. The court requested additional briefing on several issues, including the possible application of the public trust doctrine. Whether Montana courts follow California's lead in interrelating the public trust doctrine and the prior appropriation doctrine remains to be seen.

Thus, as has been discussed, Montana's water situation parallels the major developments in water law and policy in the West. Because of the intensive consideration now being given by the state to water marketing, inter-basin strategies, and other issues, Montana is in a unique position both to lead in developing innovative water policy and to learn from the experiences of other states. Before discussing what those policies might be, we need to review the law and policy of the Upper Missouri and Montana's own water policy. These are the subjects of the next two chapters.

**TABLE 3:**  
**Summary of Trelease Recommendations**

**Strategy 1: Rely on the 1944 Flood Control Act as allocation**

- (a) Have Attorney General and water managers carefully review opinion

**Strategy 2: Monitor Activities Which Threaten 1944 Flood Control Act and O'Mahoney/Milliken Amendment**

- (a) Monitor Congressional proposals and action
- (b) Development and use arguments that upstream development has more economic value than downstream navigation uses
- (c) Establish \$200,000 Attorney General contingency fund

**Strategy 3: Monitor Other Activities Which Threaten Montana's Water Development**

- (a) Monitor federal project funding
- (b) Monitor High Plains project

**Strategy 4: Encourage Conflict Resolution**

**Strategy 5: Prepare for the Eventuality of a New Allocation ("Get Our Own House in Order")**

- (a) Document existing water rights and uses
  - (1) statewide adjudications
  - (2) hopefully, decrees in Missouri and Yellowstone basins by end of 1987
- (b) Quantification of Indian and federal reserved water rights
  - (1) continuation of compact process
- (c) Resolve Yellowstone River Compact issues



- (1) apportionment
  - (2) development of accounting and forecasting system
  - (3) Indian water rights of Crow and Northern Cheyenne
  - (4) apportionment of Little Big Horn between Montana, Wyoming, and Crow tribe
  - (5) possibility of diversion of Wyoming's share in Montana
  - (6) constitutionality of Article X (unanimous approval for out-of-basin exports)
- (d) Develop centralized water resource management system
- (1) inventory and index all pertinent water resource data
  - (2) assess accuracy and completeness of all existing data
  - (3) standardize data collection procedures
  - (4) develop and implement centralized data system easily accessible in useable format for all users
  - (5) establish continuous and integrated water resource data collection and management system
- (e) Plan and establish future claims to water
- (1) special reservation process for Missouri (patterned after existing reservation system)(needs special legislative authorization):
    - \*identification of water resources
    - \*identification of potential uses
    - \*input from other agencies and interested users
    - \*preparation of environmental impact analysis
    - \*public hearings
    - \*consideration and order by Board of Natural Resources and Conservation; or consideration and adoption by legislature

Or

- (2) use process patterned after Montana's existing water reservation system
- (f) Create advisory council (or use existing Water Development Advisory Committee) to identify and resolve policies and issues



## Strategy 6: Develop Water Uses in Montana

- (a) Promote federal water projects
  - (1) identify projects qualifying under Pick-Sloan, prioritize them and seek federal authorization and funding
- (b) Perfect water reservations
  - (1) develop water reserved under Yellowstone River reservation
  - (2) state should monitor development and compliance with reservation order
  - (3) legislature should, if needed, provide funding for additional technical and financial assistance to fully develop conservation district reservations
- (c) Develop state water projects
  - (1) state should consider building new projects
- (d) Assist Indian water development
  - (1) joint Indian/state water projects as catalyst for quantification and resolution of Indian reserved rights on the seven reservations in Montana (*e.g.*, Tongue River Dam enlargement)
- (e) Assist private water development
  - (1) technical and financial assistance
  - (2) funding source might be Montana Water Development Program
- (f) Potential sources of funding for water development need to be considered:
  - (1) water marketing
  - (2) hydropower development on federally-owned facilities
    - \*state should consider possibility of joint local-state-federal development of hydropower on such federally owned facilities as Yellowtail Afterbay Dam
    - \*state would fund state and local share through Montana Water Development Program
    - \*revenues would be pledged to other water development projects

- (3) hydropower development on state-owned facilities
  - \*continuation of existing policy to develop hydropower and pledge revenues to water development
- (4) increased use of coal severance tax revenues to fund water development



### CHAPTER 3: THE LAW AND POLICY PERTAINING TO THE INTERSTATE MOVEMENT OF WATER

Montana is a part of two water regions: one that has been artificially defined and imposed by man and the other that is the creation of nature. The first region is built upon economics and the needs of society. As discussed in the previous chapter, the increasing need for and value of water, coupled with the removal of interstate barriers to the movement of water (due to the Sporhase case) and the technical ability to move that water, have combined to create a region that extends as far as a pipeline can be built.

Montana has long been part of the second water region (omitting for purposes of this report the Columbia River Basin) - one defined by the hydrogeological features of the Northern Great Plains. In this region, waters have always flowed interstate, oblivious to the borders man might draw. It is the region of the Missouri River Basin.

Even in this hydrological region, with some of the longest free-flowing river stretches in America, humans have imposed their institutions and seek to continue to do so. Since 1944, the federal government has constructed a series of large dams and storage reservoirs on the Missouri River and has developed a set of laws and regulations to manage them. And now, the ten states in the basin are beginning the search for a means and basis to divide among them the waters of the river and its tributaries. The laws and policies which authorized the construction of these major projects, their management, and the means for dividing the waters are collectively known as the "Law of the River." This evolving body of law is the subject of this chapter and is dealt with in two sections: (1) those laws and policies which presently provide for the management of the Missouri River; and (2) the various legal means by which the waters of the basin might be apportioned among the states.

## A. Water Management in the Missouri River Basin

### 1. Origin of the Pick Sloan Plan

The Missouri River Basin of 40 years ago was a region whose character was defined by the struggle of its people against the vagaries of nature. The seasonal lack of water for agriculture and human consumption, inadequate transportation and electrical power, and the devastation of severe flooding, draught and soil erosion limited regional growth. Relief from these conditions was sought through the planning efforts of two federal agencies: the Corps of Engineers, which proposed a basin-wide program of flood control and navigation enhancement, and the Bureau of Reclamation, which proposed extensive irrigation development and hydropower generation.

Recognizing that the two plans complemented each other, the Congress forged a compromise known as the Pick Sloan Missouri Basin Program, which was adopted as part of the 1944 Flood Control Act.<sup>72</sup>

The Pick-Sloan Plan directed the two agencies to proceed with the development of the Missouri River Basin, "as speedily as may be consistent with budgetary requirements."<sup>73</sup> The focus of the plan was to impound and control the Missouri and its tributaries for irrigation, flood control, navigation, sediment abatement, fish and wildlife enhancement, hydroelectric power generation, and other multiple-purpose benefits.

As originally envisaged, the plan did not fully recognize municipal and industrial water uses as primary benefits. These uses, however, have and will continue to become increasingly important parts of the program. In fact these additional uses contribute significantly to the escalating conflict over Missouri Basin water management.

While the Pick-Sloan Program recognized all beneficial uses of the river's water, the framers of the plan and later policymakers recognized the need to define which uses would receive priority. Senators O'Mahoney of Wyoming and Milliken of Colorado, anticipating potential future conflicts, succeeded in attaching amendments (O'Mahoney-Milliken Amendment)<sup>74</sup> to the enabling legislation, which were favorable to the arid West. These amendments guaranteed that affected states would share



in the planning of proposed projects for the basin. Most importantly for the West, these amendments guaranteed that navigational use of the river was subordinate to existing or future beneficial consumptive uses in the arid portions of the basin west of the 98th meridian.

## 2. Dam construction and operation

To implement the Flood Control Act of 1944, the Corps of Engineers constructed five major dams on the Missouri: Garrison, Oahe, Big Bend, Fort Randall, and Gavins Point. Fort Peck Dam, which had been constructed in the 1930s, was incorporated into the program. The aggregate capacity of these six dams totals over 75 million ac-ft of water, and 1.6 million acres of land were acquired for these dams and reservoirs. The Pick-Sloan Plan also called for 137 irrigation units intended to provide water to nearly 5 million acres of previously undeveloped land and for a supplemental water supply to be delivered to about 547,000 acres.

Forty years after its authorization, the plan has accomplished many of its goals, but the downstream states have derived most of the direct benefits of flood control, hydroelectric power, and navigation. The planned irrigation units in upstream states have fallen short of the original goals. Montana has accrued only 5 percent of the planned irrigation development, and North and South Dakota have received 1 and 2 percent, respectively, despite the fact that these states sacrificed over one million acres of productive land for the reservoirs. The situation for the upstream states is made even more difficult due to new cost-sharing requirements of the federal government and fewer federal dollars available for water projects. The originally planned irrigation units are still on the books, but Congress has cancelled the blanket authorization for all projects not started by August 1964.

Despite the fact that the downstream states have benefitted from water that was intended for consumptive uses in the upper basin, the upstream states are free to develop these consumptive uses at the expense of downstream navigational and hydropower uses. The O'Mahoney-Milliken Amendment is key to this point.

The Corps of Engineers' operating policies for the mainstem reservoirs recognize that water resource development in the Missouri River Basin is still in progress, and they provide for modification of these services consistent with the priorities established by law. The Corps meets the various downstream needs by controlled releases of water stored in the reservoirs according to the following general plan:

[1] [F]lood control will be provided for by observation of the requirements that an upper block of the intermediate storage space in each reservoir will be vacant at the beginning of each years flood season, with evacuation scheduled in such a manner that flood conditions will not be significantly aggravated if at all possible.

[2] [A]ll irrigation and other upstream water uses for beneficial consumptive purposes during each year will be allowed for.

[3] [D]ownstream municipal and industrial water supply and water quality requirements will be provided for.

[4] [T]he remaining water supply available will be regulated in such a manner that the outflow from the reservoir system at Gavins Point provides for equitable service to navigation power.

[5] [B]y adjustment of releases from the reservoirs above Gavins Point, the efficient generation of power to meet the areas needs consistent with other uses of power market conditions will be provided for.

[6] [I]nsofar as possible without serious interference with the foregoing functions, the reservoirs will be operated for maximum benefits to recreation, fish and wildlife.<sup>75</sup>

The Corps has developed long-range regulation studies to establish and demonstrate the capabilities of the system and to establish criteria for planning, design, and operational purposes. Annual operating plans are published by the Reservoir Control Center of the U.S. Army Corps of Engineers, Missouri River division. These annual operating plans are published for the coming year and also summarize actual operating conditions for the past year. Five-year plans and special purpose plans

are also published. These annual operating plans provide detailed operating rules and procedures for the mainstem reservoirs.

To summarize how the Corps manages its Missouri reservoirs: authorizing legislation and documents for the mainstem reservoirs do not allocate storage volumes or reservoir yields for specific project purposes, nor do the legislation or accompanying documents detail or require specific operating procedures for the six mainstem reservoirs. Thus, the Corps of Engineers has developed reservoir rule curves and operating policies which are consistent with the authorizing legislation and documents and provide flexibility for changes as new demands or changed demand occur for Missouri River water development. These rule curves and operating curves are developed in coordination with other federal and state agencies.

Water rights and institutional arrangements concerning water stored in the six mainstem reservoirs vary by state. In accordance with the 1944 Flood Control Act and Section 8 of the Reclamation Act,<sup>76</sup> the Bureau of Reclamation must apply to the respective states for project water rights for irrigation and other consumptive uses from the mainstem reservoirs.

Water rights for Fort Peck Reservoir, the only Montana mainstem dam, are not presently quantified. Required by the Montana water rights adjudication program,<sup>77</sup> however, the Corps of Engineers and Bureau of Reclamation have submitted claims for water. These claims cover water for various purposes including navigation, irrigation, fish and wildlife, municipal, and other uses. Under a master agreement<sup>78</sup> with the Bureau of Reclamation, Montana DNRC has the authority to market 300,000 acre feet of water from Fort Peck Reservoir for industrial uses. Each subcontract for industrial water will follow an approval process whereby the Bureau will approve the subcontract as to form and the state will issue water rights for the use. Progress is also underway on a similar agreement to market water from Yellowtail, Tiber, and Canyon Ferry reservoirs on the upper Missouri and its tributaries.

The Trelease report, in describing in detail the management of Missouri River waters by the Corps, Bureau of Reclamation, and others,

makes the following important points in describing the current allocation system:

Many of the proposed irrigation units included in the authorizing documents and legislation are yet to be developed, or have not been developed to the extent proposed in the authorizing documents. As a consequence, the significant consumptive use associated with the more than two million acres of new irrigation land described in the authorizing documents is yet to be felt. However, despite this lower level of consumptive use, it would be difficult to say that 'surplus' water exists in the Missouri River Basin today.

Regulation studies for the Missouri River mainstem reservoir system by the Corps of Engineers indicate that available water supply at present is not adequate to provide a full navigation season 89 percent of the time under hydrologic conditions similar to 1898-1979. Service of at least 5.5 months duration can be provided with dredging in a period of extended drought conditions. In addition, the operation of the mainstem reservoirs is optimized each year in annual operating plans for the production of hydroelectric power in concert with navigation, river water quality maintenance, accumulation of storage, and other purposes.

The O'Mahoney-Milliken Amendment, however, probably gives priority to irrigation for use of the mainstem water. Therefore, while there is no 'surplus water' at the present time, future irrigation and other water depletions can occur at the expense of navigational and hydropower uses.<sup>79</sup>

### 3. Water planning organizations in the Missouri River Basin

As noted in [Section 4(1)] above, the Flood Control Act of 1944 provided for participation by the states in planning allocation of Missouri River waters. The sixth basin planning organization since 1884, the Missouri Basin Inter-Agency Committee included for the first time representation from the Missouri Basin states in its organization. This organization functioned as an information exchange for 27 years, followed by two similar organizations, the last of which, the Missouri



River Basin Commission, was terminated in 1981 by the Reagan administration.

Just before the commission's demise, the ten governors of the Missouri River Basin states agreed to create a successor organization, the Missouri Basin States Association (MBSA). The association was established as a nonprofit corporation governed by a board of directors consisting of two representatives from each basin state and approved by the state's governor.

The organization's founders charged it with completing two major studies and continuing the coordination, information exchange, and special studies programs that had existed in the basin for several decades. Another purpose of the MBSA is to analyze basin or regional water issues. It is not designed to establish priorities for water use in the basin or to comprehensively plan for those uses.

Two important current activities of the MBSA are development of a Missouri River Basin water accounting system and the promotion of conflict resolution among the basin states. The first project was one element of the recently completed study entitled Missouri River Basin Hydrology Study.<sup>80</sup> A data base of water use and availability for the basin has been assembled and lauded by many as the most accurate and current information presently available. There is no agreement among each of the basin states, however, that this data base should be used by all as the platform from which to launch planning for future water development and management. The directors are attempting to reach agreement on the use of the data base.

The second important project of the MBSA is to encourage resolution of any conflict that is likely to arise if upstream states were to propose any further diversion of water above Sioux City, Iowa. A committee of the MBSA has been investigating the possibility of setting some threshold level of water use or depleted streamflow level which all states could agree would impose no significant impact on mainstem flows. The states would agree not to protest use of water up to that threshold level. The committee continues to work toward development of a basinwide conflict resolution mechanism of this type.

## B. Apportionment

Although there are several interstate compacts affecting various management aspects of the Missouri River and its tributaries, the waters of the river itself have not been apportioned among the basin states. Many commentators believe such an apportionment is both inevitable and desirable: inevitable because of increasing competition in the basin for both consumptive and instream uses of the water; desirable because an apportionment, if done fairly, would provide certainty as to the respective allocation of water and would alleviate the existing and ever-growing tensions among the states and users concerning the resource.

The apportionment of waters of an interstate stream can be brought about by litigation (an "equitable apportionment" action), Congressional action, or by interstate compact negotiated by the states and ratified by the Congress. Each alternative is usually distinct in its methods. From Montana's vantage point, each has its own advantages and disadvantages. The following summarizes both the method and merit of each.

### 1. Equitable apportionment litigation

Suits have occasionally been brought by one state against another in order to resolve interstate water conflicts. In accordance with Article III, Section 2 of the U.S. Constitution ("In all cases...in which a state shall be a party, the Supreme Court shall have original jurisdiction"), the U.S. Supreme Court has both original and exclusive jurisdiction.

In such litigation, a special master is usually appointed after the filing of pleadings and preliminary motions to hear and evaluate the evidence. The master then prepares findings of fact and conclusions of law and a recommended decree that the Court is free to follow, modify, or reject.

The final decree of the Court is binding on all claimants to the water even though they may not have been party to the litigation. These private claimants have no rights in excess of the state's share of the water because, under the doctrine of parens patriae, each state is

deemed to represent all its citizens, and each citizen is bound by the decree.

The Supreme Court has exercised its original jurisdiction relatively few times to resolve interstate water conflicts. From these cases, the contours of equitable apportionment law (a form of federal interstate common law) can be surmised. One attorney, George Sherk, who made a presentation on these actions, has summarized the major features of this body of law as follows:

States are obligated to share interstate water resources. If a State's share of an interstate water resource is adversely affected by the actions of another State, the State whose interests have been injured may ask the Supreme Court to equitably apportion the water resource. If Congress has not acted to resolve the conflict, or if the States have been unable to resolve their differences through an interstate compact, the Court will apportion the water resource among those States sharing the resource.

A State seeking an equitable apportionment, however, must show that it is actually being harmed by the actions of another State. This harm, as stated in Connecticut v. Massachusetts, must be 'real or substantial injury or damage.'<sup>81</sup> Because of this, equitable apportionment is basically a 'downstream remedy.' It would be difficult to imagine a downstream action which would do harm or injury to an upstream State....

As stated in [Colorado v. New Mexico<sup>82</sup>], injury or damage must be shown by clear and convincing evidence. In essence, it must be highly probable that the facts alleged by the complaining State are true. Once a complaining State has met this burden of proof, the burden shifts to the defending State(s) to prove that the diversions complained of should be allowed to continue. This proof must also be by clear and convincing evidence.

If the complaining State and the responding State(s) meet their respective burdens of proof, the Court will be forced to fashion a decree equitably apportioning the shared water resource (balancing the equities). Because each case will focus on a

specific set of facts, each decree will be unique.

In fashioning its decree, the Court will not follow riparian water law, nor will it be bound by a strict priority of appropriations. Prior appropriations will be a guiding principle, especially in cases involving only prior appropriation doctrine States, but will not be the only consideration. As stated in Nebraska v. Wyoming,<sup>83</sup> the Court will consider all relevant factors including physical and climatic conditions, consumptive use of water in different sections of a stream, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas and the damages to respective State interests if limitations on water use are imposed. Given the Court's language in both Vermejo I [Colorado v. New Mexico<sup>84</sup>] and Vermejo II [Colorado v. New Mexico<sup>85</sup>], the extent to which the respective States have conserved and augmented their water supplies will also be considered. In essence, the Court has evolved a doctrine of "equitable priority."

When fashioning its decree, the Court may require the States to take such affirmative acts as the treatment of wastewater or the conservation of water.

One thing is clear, however. Once the Court has fashioned its decree, it will generally refrain from any involvement in the administration of water rights under the decree in specific States. Implementation of the decrees will be the responsibility of the States.<sup>86</sup>

Of this statement of law, it is most important to remember two considerations. First, equitable apportionment is an equitable action - seeking to do justice between the competing states. States have "equality of right," meaning that in general terms they appear before the Court on an equal plane. The Court, in achieving an equitable apportionment, has the power to limit established uses in a state. Yet, as the court's recent decision in Colorado v. New Mexico<sup>87</sup> indicates,



states that have developed established uses, particularly as a part of a state water plan, tend to have more equities in their favor:

We have only required that a state proposing a diversion conceive and implement some type of long-range planning and analysis of the diversion it proposes. Long-range planning and analysis will, we believe, reduce the uncertainties with which equitable apportionment judgments are made.<sup>88</sup>

Because of the equities that accrue to a state having such a plan, it is important that Montana complete and state its water plan.

The second set of considerations involves being a headwaters state, as in Montana's case. Because of its strategic geographic position, Montana has had a false sense of comfort that it could always control the resource. Yet, in this most recent decision from the U.S. Supreme Court, eight justices of the court have indicated that "the source of the River's waters should be essentially irrelevant to the adjudication of these sovereigns' competing claims."<sup>89</sup> Yet, because it is a headwaters state, Montana is unlikely to be able to demonstrate the damage necessary to initiate an equitable apportionment action. The waters will continue to flow through the state. Thus, Montana will always be in a defensive position of proving, by clear and convincing evidence, that its diversions should be allowed to continue. A state water plan is important in preparing for that showing, as are adequate preparation in anticipation of litigation, the avoidance of waste of the resource, the availability and implementation of reasonable conservation measures, and other factors.

## 2. Congressional apportionment

A second means by which an interstate apportionment of a river's waters can be accomplished is through Congressional action. Yet, the Congress has acted only once to impose an interstate apportionment.<sup>90</sup> While several measures were considered by the 98th Congress affecting the interstate movement of water, none of these bills proposed an apportionment of the waters of the Missouri.

Introduced in the 98th Congress, however, were measures to authorize coal slurry pipelines and to override the holding in Sporhase

v. Nebraska. None of these bills were enacted prior to the adjournment of the 98th Congress in December 1984. Coal slurry legislation (HR 1010, and subsequent versions, HR 3849 and HR 3857) was ultimately defeated on the House floor on September 27, 1983. The Senate version (S 267) was favorably reported by the Energy and Natural Resources Committee, but no floor action was ever taken. While both bills sought to give coal slurry pipeline companies the federal power of eminent domain, both bills also included provisions "saving" state water rights jurisdiction by allowing states (regardless of any resulting impact on interstate commerce) to exercise authority over the use of water for coal slurry purposes. These provisions were intended to accomplish a "use-specific" reversal of the Supreme Court's decision in Sporhase.

A more complete reversal of Sporhase was sought in HR 1207 introduced on February 2, 1983. The bill died in the House Interior Committee. A bill drafted by several western states to override Sporhase was never introduced in the 98th Congress.<sup>91</sup>

Several measures, however, were introduced by Lower Missouri States in apparent response to South Dakota's sale of water for coal slurry pipeline purposes. One bill, HR 1749, introduced on March 1, 1983, by Rep. Bedell of Ohio, would have prevented out-of-state transfers of waters from interstate streams or shared aquifers unless an interstate compact were in place and all the signatories concurred in the transfer. This bill died.

Another measure, HR 2516, introduced by Rep. Young of Missouri, proposed to give authority to the Missouri River Basin States to commence negotiations for an interstate compact. This measure died before the end of the session.

### 3. Interstate Compacts

The third manner in which a shared water resource might be allocated among states is through the negotiation of an interstate compact among them. Such a compact must be ratified by Congress, and Congressional consent to negotiations has traditionally been sought. There are more than 20 interstate compacts in the western United States that apportion water. Montana is a party to the Yellowstone River

Compact of 1951<sup>92</sup> along with Wyoming and North Dakota. That compact apportions the Yellowstone and its tributaries by dividing water unappropriated as of the date of the compact between Montana and Wyoming. Montana also participated in the ill-fated negotiation of a Columbia River Basin Compact from 1954 to 1968, and in the preparation of a draft Missouri River Basin Compact (1952-53).<sup>93</sup> Most recently, there has been renewed interest in a Missouri River compact, particularly among the Lower Basin states (i.e., Rep. Young's HR 2516).

This section provides a brief review of three compact experiences at very different places on the North American continent: the Colorado River Compact in the Southwest; the Prairie Provinces Water Apportionment Agreement in Western Canada; and Montana's own experience with the Yellowstone River Compact to which Wyoming and North Dakota are also signatories. These three experiences provide a review of the essential features, strengths, and weaknesses of compact-type arrangements. The remainder of this section is devoted to setting forth certain important generalizations about compacting and some of the considerations Montana policymakers should keep in mind.

a. Colorado River Compact [This subsection adapted from G. Weatherford, "Some Musings About a Compact for the Missouri River Basin"<sup>94</sup>]

The Colorado River system is affected by two compacts: the basin-wide seven-state 1922 Colorado River Compact,<sup>95</sup> and the five-state 1948 Upper Colorado River Basin Compact.<sup>96</sup> The 1922 compact (which became effective as a six-state accord in 1928 and was finally approved by hold-out Arizona in 1944) divided the consumptive use of the Colorado River's flow between upper and lower parts of the basin, muting upriver fears about preemptive downstream appropriations and facilitating federally subsidized water and power development for southern California.

Several forces combined to produce the compact. The highly irrigable Imperial Valley was lobbying mightily for a federal dam on the river to provide storage, flood control and silt reduction, and for a diversion canal located entirely north of the U.S.-Mexico border. Los

Angeles, competing with private power interests, became intent on obtaining electric power from the envisioned dam and reservoir at Boulder Canyon. The federal reclamation service's desire to construct a high dam to promote irrigation in the lower reaches of the basin became embodied in a formal report and legislative proposal in 1922. Pending in the U.S. Supreme Court at the time was the Wyoming v. Colorado<sup>97</sup> lawsuit over the Laramie River which held out the prospect (later in June 1922 the reality) that the high Court would recognize the prior appropriation doctrine in interstate water disputes, giving the earlier (senior) appropriator in time preference over the later (junior) one. Fast-paced water development in southern California could thus give that area senior rights over the planned and potential uses upstream.

All of these forces and prospects made the upstream states, which expected to develop more slowly, legitimately nervous. Led by Colorado, those states came to see the need for a compact-guaranteed allotment or reservation of sizable shares of the river's flow for themselves. So, there was a rising mutuality of interest and sense of urgency -- southern California had political power but needed a recognized right to water to make any federal water project investment feasible, and the upper basin states needed a protected share of the flow. Present developments in the Missouri River Basin in many ways parallel this earlier situation on the Colorado.

Commissioners representing the seven basin states, joined by President Harding's representative, Herbert Hoover, began negotiating the compact in January of 1922 and, after long days of argument, approved their compact document in November of the same year. Agreement could not be reached on water entitlements for each state; instead the compact divides beneficial use of water between a lower basin and an upper basin (the boundary lines run through a point, called Lees Ferry, about ten miles downstream from where the Glen Canyon Dam now sits).

The 1922 compact, while declaring that each of those sub-basins was apportioned perpetually "the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum," provides that the upper states will not cause the flow of the river as Lees Ferry to be depleted below



an aggregate of 75,000,000 ac-ft for any period of ten consecutive years.<sup>98</sup> Practically speaking, this guaranteed minimum delivery requirement means the upper states bear the risk of shortage. The flow records on which this apportionment was based were for a limited period that we now know was abnormally high. Instead of the 16.4 million ac-ft/yr average flow that the negotiators assumed for the river at Lees Ferry, current estimates range from about 13.5 to 14.8 million ac-ft/yr, leaving the upper states with considerably less potential supply than the 7.5 million acre feet proclaimed for them.<sup>99</sup>

The 1922 compact did many more things than create an upper and lower basin apportionment formula. It anticipated a water treaty by specifying how water for Mexico would be charged against the system. It made electric power generation subordinate to agricultural and domestic uses. It deferred the question of Indian water rights with the now famous (or infamous) disclaimer: "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes," language later used in the Upper Colorado River Compact (and approximated in the Yellowstone River Compact<sup>100</sup>). The 1922 compact did not create an administrative mechanism such as a commission, although it did mandate interstate and federal-state cooperation.

Since the 1922 compact did not apportion water to each state, there remained that task. The Boulder Canyon Project Act of 1928,<sup>101</sup> over Arizona's objections, authorized the construction of Boulder Canyon (now Hoover) Dam, the All-American Canal for Imperial and Coachella valleys, the approval of the 1922 compact as a six-state agreement, and consented to another possible compact that would apportion annually 0.3 million ac-ft to Nevada, 4.4 million ac-ft and half of the surplus to California, and 2.8 million ac-ft plus half the surplus to Arizona. That latter tri-state compact was never negotiated, although the apportionment it suggested became a reality when the U.S. Supreme Court in the fourth Arizona v. California case concluded in 1963 that Congress delegated the power to the Secretary of Interior to apportion water to those states by contract.<sup>102</sup>

Mexico was recognized a right to 1.5 million ac-ft/yr in the international treaty of 1944.<sup>102</sup> Then the upper basin states, desiring more federally subsidized water projects for their region, realized that water rights had to precede development and negotiated their own compact (essentially during three weeks) in 1948. The resulting Upper Colorado River Basin Compact, unlike its 1922 relative, did apportion water to individual states and did authorize a compact commission. Wisely, given the uncertainty as to the amount of firm water available to it under the 1922 compact and climatic variability, the upper basin arrived at a percentage formula of apportionment: 11.25 percent for New Mexico, 14 percent for Wyoming, 23 percent for Utah, and 51.75 percent for Colorado. The interests of the four states are centered in the Upper Colorado River Commission, composed of a representative from each state and the United States, and located in Salt Lake City. The 1948 compact prepared the way for the Colorado River Storage Project Act of 1956 that authorized Glen Canyon Dam and a host of other upper basin projects.

The apportionment of water to Indian tribes in the Colorado River Basin, an issue side-stepped by the 1922 and 1948 compacts, is only partially complete. Five lower Colorado River tribes were awarded reserved water rights in the latest Arizona v. California<sup>104</sup> decision, those apportionments being chargeable against the entitlements of the states in which the reservations are located.<sup>105</sup> Other reservations have been variously litigating, negotiating or delaying quantification of their claims.

Other issues not addressed by the 1922 or 1948 compacts are water quality and groundwater. Salinity control is overseen by an interstate salinity control program largely paid for by the federal government. Groundwater remains subject to state-by-state regulation.

b. Prairie Provinces Water Apportionment Agreement<sup>106</sup>

Another example of an inter-jurisdictional handling of the apportionment of a shared waterway is the Prairie Provinces (Canada) Water Board that operates under the Apportionment Agreement of 1969,

entered into by the governments of Canada, Alberta, Manitoba, and Saskatchewan. The agreement covers those interprovincial rivers and streams flowing eastward from Alberta, through Saskatchewan and Manitoba, and ultimately emptying into Hudson Bay. The principal rivers are the Saskatchewan, Churchill, Assiniboine, and Qu'Appelle.

The Prairie Provinces Water Apportionment Agreement is actually four interdependent sets of documents: (1) a master agreement; (2) two agreements determining the amount of water that must be allowed to flow in the eastward flowing interprovincial rivers; (3) one between Alberta and Saskatchewan and the other between Saskatchewan and Manitoba; and (4) an agreement reestablishing the Prairie Provinces Water Board.

The core of the inter-jurisdictional arrangement is the agreement on the apportionment of the shared flowing surface waters: Alberta must permit one-half of the natural flow of each watercourse to pass into Saskatchewan. Likewise, Saskatchewan must permit one-half of the water received from Alberta and one-half of the natural flow in Saskatchewan to flow into Manitoba. Natural flow is defined as the water which would flow had the flow not been affected by human intervention, and excludes water unavailable under any international treaty. The actual flow is adjusted on an equitable basis at various times during the year. The Prairie Provinces Water Board, comprised of two federal representatives and one from each of the provinces, administers this and all other features of the agreement.

The Prairie Provinces Apportionment agreement is a simple, useful, and apparently successful model as to how inter-jurisdictional waters can be apportioned. Although there has been some criticism that the apportionment does not yield the most economically efficient use of the waters (by not allocating the water to the provinces having the highest bidders), this limitation may eventually be overcome with the development of a regional water market. Also, the agreement has not resulted in the anticipated shared construction of water development projects or in effectiveness in implementing the agreement's water quality provisions.

c. Yellowstone River Compact

The Yellowstone River Compact<sup>107</sup> was signed by Montana, Wyoming, and North Dakota in 1950. It was ratified by the Congress later that same year. The agreement allocates among the three states both the appropriated and unappropriated rights to the Clark Fork of the Yellowstone, Bighorn, Tongue, and Powder rivers. The compact confirms water that had been appropriated prior to 1950 and divides the remaining unappropriated waters between Wyoming and Montana (North Dakota not receiving a share of unappropriated water) as set forth in Table 4. The apportionment is on a percentage basis of the flow at the mouths of each of the four streams. Existing and future domestic and stock water uses are excluded from the compact.

Since 1950, there has been sufficient water in the four major streams to adequately supply pre-1950 water rights and post-1950 development without invoking the percentage allocation contained in the compact. Thus, no specific quantity of water to which each state is entitled has been determined.

Due to other developments and changed circumstances since the execution of the compact, several outstanding issues exist. The Trelease report has enumerated a few of them:

1. The need to develop an accounting system with forecasting capability which will allow the Compact Commission to administer the agreement, including a determination of the amount of water available to each state.
2. The need to resolve the Indian reserved rights of the Crow and Northern Cheyenne tribes and the effects of those rights on the compact allocation.
3. The need to resolve the apportionment of the Little Big Horn among Montana, Wyoming, and the Crow tribe.
4. The need to determine whether Wyoming will be allowed to divert some of its compact share on the Yellowstone mainstem in Montana and to transport it back to Wyoming.
5. The need to resolve the constitutionality of Article X of the compact which requires the consent of all the signatories before water can be diverted out of the basin.<sup>108</sup>



TABLE 4:  
Diversions of Water  
Under the Yellowstone Compact

Tributary	Montana		Wyoming	
	%	Ac-ft/yr	%	Ac-ft/yr
Clarks Fork Yellowstone	40	285,000	60	429,000
Big Horn	20	400,000	80	1,800,000
Tongue	60	144,700	40	96,400
Powder	58	166,600	42	120,700
Total		966,300		2,446,100

Source: Wyoming State Engineer's Office (1973)

### C. Implications for Montana

It is predictable that the waters of the Missouri River Basin will eventually be allocated among the ten member states in the basin. We have seen how that apportionment could come about through litigation, Congressional action, or interstate compacting. The Trelease report has analyzed the possible outcomes to Montana from each of these methods,<sup>109</sup> and a summary of those scenarios is set forth in Table 5.

Some general observations, however, are in order. A headwaters state like Montana has an obvious physical advantage in controlling the waters rising within its boundaries. This physical advantage is buttressed by the provisions of the O'Mahoney-Milliken Amendment which gives the state preference in its consumptive uses over the navigation uses downstream.

There are limitations to these advantages. First, as the lower basin states develop at a rate faster than Montana, they will be putting the waters of the river to use for municipal and industrial purposes; and these beneficial uses are not automatically subordinated under the O'Mahoney-Milliken Amendment. As the water is put to use, the equities shift to the lower basin because the U.S. Supreme Court, in an equitable apportionment action, is reluctant to reduce existing uses. Also, since the lower states benefit from water not put to use upstream, the lower basin states have a political incentive not to support upstream water development. And expensive water development is what Montana needs if it is to have a high level of certainty of its water rights.

Second, it is unclear whether transbasin, interstate diversions qualify as preferred consumptive uses under the O'Mahoney-Milliken Amendment. If they do not, any desired sale or exportation of Montana's water might be curtailed if it affected downstream navigation rights.

Thus, there are uncertainties about the status quo; and for Montana to firm up its claim to future waters, expensive water development will need be undertaken. Compacting does offer an appealing alternative. Once executed, a compact can provide certainty in terms of present and future water entitlements. Expensive water development need not be undertaken solely to establish a right. Yet, compacts do not solve

TABLE 5:  
Scenarios of Missouri River Basin Allocation Procedures

ACTION	RESULT	EFFECT
<u>I. EQUITABLE APPORTIONMENT</u> (INTERSTATE LAWSUIT)		
<ul style="list-style-type: none"> <li>• <u>Lower basin v. Upper basin</u> Suit to enjoin threatened harm from single project or combined depletions. Principal defense, OMahoney-Milliken Amendment.</li> </ul>	<p>Lower basin "wins." Harmful depletions enjoined.</p> <p>Upper basin "wins." All depletions permitted.</p>	<p>Allowable depletion divided among upper basin states by:</p> <ul style="list-style-type: none"> <li>• Lawsuit</li> <li>• Compact</li> <li>• Congress</li> </ul> <p>No allocation needed. Sufficient water for all states consumptive uses.</p>
<ul style="list-style-type: none"> <li>• <u>Upper basin v. Lower basin</u> Depleting projects blocked by uncertainties caused by downstream claims; suit to declare rights</li> </ul>	<p>Upper basin "wins."</p> <p>Lower basin "wins."</p>	<p>Projects proceed.</p> <p>Possible need for allocation among upper basin states, as above.</p>
<ul style="list-style-type: none"> <li>• <u>Upper basin states v. Each other.</u> Upper basin depletions restricted to low levels (by any process); suit to divide permissible depletions.</li> </ul>	<p>Share of available water allocated to each state.</p> <p>Refusal to divide unappropriated water.</p>	<p>State agencies restrict permits to state's quota.</p> <p>Compact or Congressional allocation.</p>
<ul style="list-style-type: none"> <li>• U.S. refuses to become a party to any or all of above suits.</li> </ul>	<p>Suit dismissed.</p>	<p>Compact or Congressional allocation.</p>
<u>II. INTERSTATE COMPACT</u> (VOLUNTARY AGREEMENT)		
<ul style="list-style-type: none"> <li>• All Missouri Basin states agree to solve conflicts by compact; Congress grants consent to negotiate.</li> </ul>	<p>Water allocation compact that limits upper basin to low or medium development, with compensating advantages to upper basin.</p> <p>Water allocation compact that allows high upstream development with compensating advantages to lower basin.</p>	<p>Need for supplemental compact on suit to allocate water among upper states.</p> <p>Upper basin states develop fully without allocation between them.</p>

	Delaware-type water management compact, U.S. joins as party, compact creates commission.	Upper basin projects proceed as per commission approved plans.
	Negotiations fail.	Resort to: <ul style="list-style-type: none"> <li>• Interstate lawsuit</li> <li>• Congress</li> </ul>
	Water allocation compact that divides available water	State agencies restrict permits to state's quota.
<ul style="list-style-type: none"> <li>• Upper basin held to low depletions, by any process.</li> </ul>	Negotiations fail.	States resort to lawsuit or Congress.
<b>III. CONGRESSIONAL ALLOCATION (LEGISLATION)</b>		
<ul style="list-style-type: none"> <li>• Action on Upper basin projects for high and medium depletions.</li> </ul>	Projects authorized and funded.	Allocation to Upper basin; projects proceed.
	Authorization or funding withheld.	Allocation to Lower basin; development held at low level.
<ul style="list-style-type: none"> <li>• New "Missouri Basin Act" to solve modern basin problems; modernizing and replacing Pick-Sloan Plan.</li> </ul>	State participation in formulation, solution fair to all states, agreeable to most, possibly Congressional enactment of failed compact.	As provided, OMahoney-Milliken Amendment becomes obsolete, modified or replaced by new Act or action under it.
<ul style="list-style-type: none"> <li>• Repeal or modification of OMahoney-Milliken Amendment in project bill or otherwise.</li> </ul>	Senate passage highly unlikely.	As provided.

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Source: Wright Water Engineers, *A Water Protection Strategy for Montana: Missouri River Basin VII-10* (1982).



everything. As has been seen, many issues, such as Indian water rights, are typically not covered by such agreements. Also, states must be well prepared as to data concerning the resource and their own present and future needs and expectations. Finally, successful compacting requires a high level of commitment by each of the involved states. On the Missouri, states may become reluctantly committed to negotiating a compact only because the alternatives may be expensive water development and/or lengthy and expensive litigation before the U.S. Supreme Court.



## CHAPTER 4: MONTANA'S WATER LAW AND POLICY

As mentioned at the beginning of Chapter 3, an understanding of water exporting issues requires an appreciation of both "the Law of the River" - in this case, the law and policy which governs the management of the Missouri River - and an understanding of Montana's own water management system. The "Law of the Missouri River" was discussed in the preceding chapter. This chapter is devoted to a review of the relevant features of Montana's water policy, law, and outstanding problems.

This chapter begins with an overview of Montana's prior appropriation system. This background information is followed by discussions of the temporarily repealed statutory ban against the export of water, the existing ban against coal slurry pipelines, the merger of pre-1973 "use" rights with the permit system instituted that year, the status of federal and Indian reserved water rights, state water planning, water development, Montana's innovative water reservation system, and the recently recognized "public trust" doctrine.

### A. Montana's Water Appropriation System

Like eight other western states,<sup>100</sup> Montana has a "pure"<sup>111</sup> prior appropriation water allocation system. So long as water is available, the system allows anyone who wants to put water to use to do so. As the system is based on seniority, the water right is subordinate to users who put the water to use earlier, but is senior to subsequent users. The water must be used for recognized "beneficial uses" such as agriculture, domestic use, mining, industrial activity, municipal supply, power, and in some states like Montana, for fish and wildlife and recreational uses. Unlike the riparian water rights system which is applied in the water-abundant eastern United States, water rights under the prior appropriation system are based on usage and not on land ownership adjacent to waterways.

Until 1973, it was only necessary for an appropriator to divert water and put it to use in order to obtain a "use right" to the water. While the right was valid so long as it did not interfere with more

senior uses, unrecorded use rights led to many disputes among users about priority dates and quantities of water used. This situation led to the passage of the Montana Water Use Act in 1973<sup>112</sup> which, among its many provisions, established a permit system as the exclusive means of obtaining a water right in Montana. Pre-1973 use rights were confirmed but subjected to a mandatory adjudication process (later modified in 1979<sup>113</sup>) for quantification.

Since 1973, persons have had to apply for a permit from the Department of Natural Resources and Conservation to appropriate surface water (except for certain stockwatering purposes<sup>114</sup>). The DNRC bases its decision for the issuance of a permit on the criteria contained in MCA § 85-2-311 which include: existence of unappropriated waters in the source of supply; the water rights of previous appropriators will not be adversely affected; the proposed means of diversion or construction are adequate; the proposed use of water is a beneficial one and will not interfere unreasonably with other planned water uses or development in the area. The 1983 Legislature modified Section 85-2-311 by including two additional requirements: (1) for appropriations of 10,000 ac-ft/yr or more, or 15 cfs or more, the DNRC must "affirmatively find[]" that the foregoing criteria are met and must consider additional factors such as economic and environmental impacts; and (2) consumptive uses of 10,000 ac-ft/yr or more, or 15 cfs or more, must be approved by the Legislature. These last two requirements were enacted on a temporary two-year basis and will be automatically repealed<sup>115</sup> on July 1, 1985, unless the Legislature otherwise acts.

The DNRC can issue temporary or seasonal permits<sup>116</sup> and can condition permits with terms necessary to protect the rights of other appropriators. The DNRC, by rule (upon petition of affected water users), or the Legislature can designate highly appropriated basins within which water rights applications can be rejected or subjected to special conditions.<sup>117</sup>

Both pre-1973 use rights and water permits can be transferred so long as the change of use, location, or permittee does not adversely affect the rights of other persons.<sup>118</sup>



## B. Montana's Temporarily Suspended Ban Against the Export of Water

The Introduction to this report has described the responses of the 1983 Legislature to the coal slurry and water marketing issues. One of the principal accomplishments of the passage of HB 908 was to suspend temporarily the provisions of MCA § 85-1-121 that had prohibited the export of water outside the State of Montana unless approved by the Legislature. This suspension was in response to the uncertainty as to the constitutionality of the statute raised by the U.S. Supreme Court's decision in Sporhase v. Nebraska.<sup>119</sup> In its place, the Legislature expanded the criteria enumerated in MCA § 85-2-311 to guide the issuance of a water permit. By the terms of HB 908, these new provisions are to expire on June 30, 1985, with the revival of the pre-existing law - including the export ban. The next chapter discusses whether temporarily-repealed statutes can be revived. The remainder of this section, however, discusses the constitutionality of the pre-existing anti-export ban. This discussion is undertaken for two reasons: (1) if the Legislature does not act in 1985, the anti-export ban may be revived and its constitutionality may be at stake; and (2) in spite of the constitutional uncertainty of such measures, some people continue to urge a complete anti-export ban.

As will be recalled, (supra pp. II-3-5) the Sporhase decision held that Nebraska's statute, which banned the export of groundwater except under limited circumstances, violated the "dormant" interstate commerce clause. Similar litigation concerning the constitutionality of New Mexico's own anti-export ban has been underway in the case of El Paso v. Reynolds.<sup>120</sup> Also, the case of Altus v. Carr (1966)<sup>121</sup> found unconstitutional a Texas statute almost identical to MCA § 85-1-121.

While not completely free of ambiguity, these cases give us helpful guidance in evaluating the constitutionality of Montana's export ban. While each of these three cases involved a prohibition on the exportation of groundwater, we should expect no different analysis by the courts when a state attempts to ban the exportation of surface water. In fact, surface water is more of an interstate commodity than groundwater. While some groundwater basins are confined within the

boundaries of one state, most rivers and streams move interstate or are tributary to interstate waters. Thus, surface water, by its interstate nature, invites more scrutiny from the courts in application of the interstate commerce clause.

The conclusion seems inescapable that the provisions of MCA § 85-1-121 are unconstitutional. Altus v. Carr, which was affirmed without opinion by the U.S. Supreme Court, involved a statute that indicated:

No one shall withdraw water from any underground source in this State for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specifically authorized by an Act of the Texas Legislature and thereafter as approved by it." <sup>122</sup>

This statute is almost identical to MCA § 85-1-121.

It is true that the Sporhase decision, in general, allows a state to impose some burdens on interstate commerce as a result of their water management and specifically allows measures by arid states to achieve water conservation for health, welfare, and safety purposes. Such restraints must, however, be closely tailored to achieve the conservation purposes intended.

The provisions of MCA § 85-1-121 fail to achieve such a closely tailored fit. While the section does not impose an absolute ban on exporting, due to the Legislature's ability to approve such a diversion, the discretion given to the Legislature is unduly broad. No criteria to guide the Legislature's consideration of an export petition are set forth; thus, the decision could be made on any basis. Also, the export petition is not required to be reviewed by DNRC prior to its submission to the Legislature. Thus, there is no assurance that an export petition will ever be subjected to expert water management scrutiny so as to determine whether the proposal threatens to endanger the health, welfare, or safety of Montanans.

The Legislature has not been faced with a petition for the exporting of water so it is uncertain how such a petition would be processed. While it is possible that the constitutionality of the

statute could be salvaged by careful legislative scrutiny of the petition on the basis of water conservation considerations, the Legislature would still face a heavy burden of justifying any denial.

C. Montana's Ban Against Coal Slurry Pipelines

Section 85-2-102, MCA, defines the beneficial use of water to mean a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses.

The use of water for coal slurry is not mentioned. Lest there be any ambiguity as to whether such use might be countenanced as an industrial use, MCA § 85-2-104 makes clear: "(1) the Legislature finds that the use of water for the slurry transport of coal is detrimental to the conservation and protection of the water resources of the state; and (2) the use of water for the slurry transport of coal is not a beneficial use of water."

Enacted in 1979, the provision was targeted for repeal by two of the water marketing measures introduced in the 1983 session of the Legislature. As has been discussed elsewhere, (infra pp. V-3-4) those measures did result in the passage of HB 908, which allows the interstate movement of water; but the coal slurry ban was maintained.

The coal slurry ban, as presently constituted, results in some potentially strange results. Surprisingly, it bans neither the transport of coal by pipeline nor the use of water in a pipeline. What it does ban is the mixing of the two substances in a pipeline.

A coal slurry pipeline can be built and operated in the state so long as the medium for transport is other than water (e.g., methane, liquid carbon dioxide). Also, water can be used as the medium in a slurry pipeline so long as the substance being transported is not coal (e.g., grain, other minerals). Even though the coal slurry ban has been justified on the basis of minimizing negative environmental impacts, the construction of a pipeline for the conveyance of coal (without water) or other substances (with or without water) is not subject to permitting under the state's Major Facility Siting Act<sup>123</sup> or any other statewide



regulatory scheme (except for possible requirement of an environmental impact statement under the Montana Environmental Policy Act<sup>124</sup>). Finally, because the Yellowstone Compact has been ratified as a matter of federal law, it probably supercedes the Montana coal slurry ban in so far as the ban pertains to diversions within the basin (Montana could still object to the appropriation under the general provisions of the Compact). Thus, it is apparent why serious questions have been raised about the policy merits of the coal slurry ban as well as its constitutionality.

Numerous experts have provided the committee with their views as to the constitutionality of the coal slurry ban. Their views have generally been mixed. Supporters of the ban<sup>125</sup> have indicated that Montana has both a strong constitutional and statutory basis for the conservation of natural resources. Article IX, Section 1, paragraph 3, of the State Constitution indicates that "the Legislature shall prevent unreasonable depletion and degradation of natural resources." With the passage of MCA § 85-2-104, the Legislature has determined that the use of water for such a purpose "is detrimental to the conservation and protection" of the resource.

The Sporhase case recognized the legitimacy of state conservation measures "to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens...."<sup>126</sup> The questions for Montana, however, become (1) whether such a ban violates the equal protection clause of either the U.S. Constitution or the Montana Constitution; and (2) whether a ban against coal slurry pipelines violates the "dormant" interstate commerce clause of the federal Constitution by impermissibly burdening commerce between the states.

The equal protection provisions of federal and state law are violated when differential treatment is imposed by government on a "suspect" class of persons or when a fundamental interest is involved. For instance, differential treatment based on racial, religious, and, in some instances, sexual distinctions is almost invariably illegal; and, in the rare instances when upheld, require a compelling showing by the



government as to why the differential treatment should be allowed. Similarly, distinctions among persons or groups of persons that are made as they attempt to exercise important fundamental rights (e.g., the right to vote, to travel, to privacy) are generally unconstitutional. For example, the U.S. Supreme Court has held that a state could not deny welfare payments to persons who had recently moved into the state; to do so hampered those persons' fundamental right to travel interstate.<sup>127</sup> When not establishing a suspect classification or affecting the exercise of a fundamental right, distinctions between similarly situated persons are generally allowed so long as a rational relationship can be drawn between the distinction and a legitimate state interest.

The Montana coal slurry ban distinguishes between the use of water for coal slurry, which is not allowed, and other slurries or industrial uses of water, which are allowed. While the ban discriminates on its face against coal slurry pipelines using water, the distinction is not drawn on the basis of either a suspect class or fundamental interest. Thus, the essential equal protection question is whether Montana can demonstrate a rational relationship between the coal slurry ban and its stated interest in the conservation and protection of the water resources (or coal or other state resources, although this is not stated in MCA § 85-2-104) of the state.

Critics of the statute<sup>128</sup> argue that the coal slurry ban is irrational in relationship to its stated purposes and cannot be sustained. The ban does not conserve coal, as the mineral can be moved by other transportation modes or, even, by pipelines using a transport medium other than water. Nor does the ban conserve water: water can be used for all other forms of pipelines.

In support of the statute, one can argue that coal slurry is a totally consumptive water use, unlike many industrial uses; that it requires continuous, large amounts of coal to operate; and that it has other environmental impacts in the construction and operation of the pipeline. The measure, therefore, represents a state policy whose purpose is to closely regulate the speed and intensity of coal development. Also, the Legislature is uniquely situated to recognize

the difference between the real possibilities of resource depletion of both coal and water by use of coal slurry pipelines and the more remote, unrealistic possibilities of coal slurry pipelines using other media or water-based slurry pipelines conveying substances other than coal.

This committee is of the judgment that the constitutionality of the coal slurry ban could be sustained against an equal protection attack. The state could probably demonstrate the "mere rationality" test imposed by the courts in their evaluation of distinctions not based on fundamental interests or suspect classifications. The ban, however, must also survive scrutiny under the interstate commerce clause.

The purpose of the commerce clause is to promote commercial harmony among the states. The Supreme Court has indicated that the clause was designed "to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the states under the Articles of Confederation."<sup>129</sup>

While the commerce clause limits the exercise of state power which burdens interstate commerce, it does not preclude all actions or policies of a state simply because they impose some burden on interstate commerce. Some are allowed, and some are not. The difficult inquiry is determining which are to be tolerated and which are to be precluded.

The first question to ask is whether the coal slurry ban discriminates on its face against interstate commerce. The prohibition against using water for coal slurry transportation purposes is not facially discriminatory. It applies with equal force to both inter- and intrastate uses of water for that purpose. One authority,<sup>130</sup> however, has pointed out that MCA § 85-2-104 was enacted in 1979 to replace a prior statute<sup>131</sup> that barred only the interstate movement of coal by water slurry. At that time, the Legislature felt that such a bald discrimination was unconstitutional. Thus, in this view, even though the present prohibition speaks of conservation and is not facially discriminatory, it is really a cosmetic touching up of a prior unconstitutional prohibition. Overall, however, unless the application of the provision unreasonably burdens or interferes with interstate commerce, it probably will be upheld.

Whether a state act or regulation interferes with commerce turns upon the nature and severity of the burden created and the local purpose served by the act or regulation. Where the act or regulation serves a legitimate local purpose, the beneficial effects of the local interest are balanced against the burden the act imposes upon interstate commerce. State acts will be upheld only where they incidentally burden interstate commerce. The test becomes one of degree. The outcome depends on the nature of the local interest involved and whether it could be promoted equally well with a lesser impact on interstate commerce.

Critics of the statutory ban argue that "coal slurry pipeline transportation systems, simply because of their size and economic scale, contemplate the interstate movement of coal to distant markets." <sup>132</sup> As these pipelines generally use water as the medium of transport, a ban on the appropriation or use of any water, regardless of its quality, may unreasonably interfere with interstate commerce. Montana's interest in protecting and conserving its waters can be pursued through other means having less impact on interstate commerce. For instance, the ban prevents the use of sewage effluent, groundwater aquifers containing brackish water, or other poor quality water not fit for human consumption or irrigation use.

Other commentators respond, as did the U.S. Supreme Court in Commonwealth Edison Co. v. Montana,<sup>133</sup> that the suggestion that virtually all pipelines run interstate is an "adventitious consideration."<sup>134</sup> In Commonwealth, the court refused to find that Montana's coal severance tax discriminates against interstate commerce even though 90 percent of the coal was shipped to other states thereby shifting the incidence of the tax to utilities and residents in other states.

Montana can also make a strong argument that the statute serves legitimate local purposes. The legislative history of the ban is dominated by concern for water quantity and quality rather than economic protectionist motives (although, with the Supreme Court's finding that water is a commodity in its Sporhase decision, state strategies to

embargo water may now be construed as economic protectionism). Also, as one writer has observed:

[I]t must be remembered that the underlying economic interest behind any challenge to Montana's statute is the assurance that coal can be mined and transported out-of-state for industrial use. The statute does not prevent the mining and transportation of coal. A slurry line can still be constructed...under the common carrier law...Other liquid or gas media are available...A pipeline that has access to water might involve lower operational costs for shippers and utility companies, but slurry proponents cannot claim a constitutionality guaranteed access to the cheapest transportation medium." <sup>135</sup>

In conclusion, the committee agrees with the observation of Professor Albert Stone of the University of Montana School of Law: the constitutionality of the coal slurry ban under the interstate commerce clause is "a close question, too close to permit reliance upon the statute."<sup>136</sup> The consequence of the state being wrong in terms of the ultimate defensibility of its ban are severe: the water could be appropriated without significant payment to the state, the pipeline could be constructed outside any significant state regulation (excepting the Montana Environmental Policy Act), and the state could be liable for the prevailing party's attorneys fees.<sup>137</sup>

#### D. Adjudication of Pre-1973 Rights

We previously discussed (supra p. I-15) the lack of an effective water recordation or permit system until the passage of the Water Use Act in 1973. Even with that statute, much uncertainty was left concerning the quantity and priority of individual pre-1973 "use rights." The 1973 Act established a stream adjudication procedure<sup>138</sup> to quantify these pre-1973 rights, and the first adjudication was initiated in the Powder River Basin.

The 1973 adjudication process proved to be extremely cumbersome. The procedure required extensive field work including having DNRC personnel walk waterways to discover all the unrecorded, unasserted, and unknown water rights. Additionally, the federal government sought to



remove the adjudication of federal and Indian reserved rights to federal court on the basis that Montana did not have an effective adjudication alternative underway in the state courts.

In response to these difficulties, the Legislature in 1979 passed SB 76<sup>139</sup> which put in place a new general stream and groundwater adjudication process. The bill created a specialized water court divided into the following four divisions:

1. Yellowstone Basin;
2. Missouri River and its tributaries below the mouth of the Marias River;
3. Missouri River and its tributaries upstream from the Marias River to its various headwaters;
4. Waters west of the Continental Divide (the Clark Fork and Kootenai drainages).

Senate Bill 76 substituted a claims process for the field investigation process. Water users asserting a claim to an existing right to use ground or surface water arising prior to July 1, 1973, were required to file their claim to water by April 30, 1982; over 200,000 claims were eventually filed.

After consideration of the claims by special water masters in each division, with the assistance of DNRC, the water judges formulate preliminary decrees for individual basins or sub-basins specifying the priority date, quantity, and other features of each recognized water right. After opportunities for hearing objections to the preliminary decrees, the water judges issue final decrees which are appealable to the Montana Supreme Court.

To date, three final decrees involving 10,716 claims have been entered; and 26 sub-basins, involving 46,726 claims, were predicted by Chief Water Judge W.W. Lessley<sup>140</sup> to be rendered to final decrees by the end of 1984. One of the final decrees - the Little Powder River involving 10,302 claims - was completed in May 1983 under the 1973 law. Judge Lessley's report appears as Table 6. He predicts that the adjudication process will be completed by 1990;<sup>141</sup> the Trelease report predicts it will take 10 to 20 years to finalize all the decrees.<sup>142</sup>

The intention of this general adjudication process is to also quantify federal and Indian reserved water rights. How this is being approached is the subject of the next section.

#### E. Federal and Indian Reserved Rights

The reserved rights doctrine has been developed by the courts to ensure that Indian lands and public lands set aside by the federal government for a particular purpose will have adequate water. The doctrine dates from the U.S. Supreme Court's 1908 decision in the case of Winters v. United States.<sup>143</sup> The reserved rights doctrine has major implications for many western states. Because the priority of the federal or Indian water rights dates from the date the reservation was created or the public lands were withdrawn for a particular use, the rights are frequently senior to many existing rights on a stream. There is uncertainty as to the amount of water necessary to serve these tribal and federal lands; and, because the majority of these claims have not been adjudicated or otherwise quantified, state governments as well as junior water rights holders face an unknown "wild card" and are frequently unable to reliably plan for the future management of their waters.

This section reviews the origins of and basis for Indian and other federal reserved water rights. The section also describes Montana's experience with federal reserved water rights - particularly through the Montana Reserved Water Rights Compact Commission - and concludes with a discussion of some of the implications for state water policy, water marketing, and the interstate movement of water.

##### 1. The Winters doctrine and Indian water rights

Winters was the first well-known case to bring the question of Indian water rights before the U.S. Supreme Court. The United States brought the case to prevent non-Indian settlers upstream from the Fort Belknap Indian Reservation in Montana from diverting water needed by the Indians to irrigate their land. The reservation had been created as the result of an agreement between the tribes and the United States, which was ratified by Congress on May 1, 1888. While the agreement did not specifically mention water rights, it did state that the purpose of

TABLE 6:  
Status of General Stream Adjudication Process  
(Under MCA S 85-2-201 as of October 1, 1984)

<u>BASIN</u>		<u>NO. OF CLAIMS</u>
FINAL DECREES		
42I	Little Power River and	
42J	Powder River below Clear Creek	10,302
38H	Little Missouri Trib	214
39H	Little Missouri Trib	200
Subtotal		10,716
PRELIMINARY DECREES		
400	Sage Creek	905
40P	Redwater River	1,885
42L	O'Fallon Creek	2,797
41N	Willow Creek	1,432
76C	Fisher River	237
76N	Lower Clark Fork	1,128
76B	Yaak River	97
76D	Kootenai River	1,395
76GJ	Flint Creek	992
76E	Rock Creek	707
41U	Dearborn River	859
41S	Judith River	5,230
41F	Madison River	2,715
76J	South Fork Flathead River	121
76I	Middle Fork Flathead River	226
76K	Swan River	663
40D	Big Dry	2,938

BASINS THAT WILL BE PRELIMINARY IN SEP/OCT 1984		
76M	Middle Clark Fork River	2,486
43BV	Sweetgrass Creek	668
43B	Upper Yellowstone	4,675
39FJ	Little Beaver Creek	961
39E	Box Elder Creek	2,512
39F	Little Missouri River	2,901
390	Beaver Creek	665
BASINS THAT WILL BE PRELIMINARY IN NOV/DEC 1984		
760	Upper Clark Fork	4,625
40E	Fork Peck	2,936
	Subtotal	46,726
	<b>TOTAL CLAIMS</b>	<b>57,442</b>

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Source: W.W. Lessley, Montana Chief Water Judge (Oct. 1984).



forming the reservation was to encourage the Indians to abandon their nomadic way of life and adopt agriculture as a "pastoral and civilized people."<sup>144</sup>

In the litigation, the non-Indian settlers argued that they had secured senior rights under Montana's prior appropriation system and that they were entitled to protection against subsequent appropriators, including the reservation Indians. Ultimately, the U.S. Supreme Court upheld an injunction restricting the upstream diversions of the non-Indians and said that water for the reservation had been reserved by implication when the reservation had been established. These waters were "exempt from appropriation under the state laws,"<sup>145</sup> and were superior to those rights previously acquired by the non-Indians. Thus, the doctrine of prior appropriation, which holds that water rights can be established only as the water is actually put to beneficial use, does not apply to Indian reservations. Consistent with the decision by the United States to provide a permanent homeland for the Indians was the implied reservation of water necessary to accomplish that purpose at a time when the Indians were able to develop their reservation. When the right is finally exercised, it dates back to the date of the reservation and has priority over intervening rights created under the state system of prior appropriation.

Winters set forth the contours of the reserved rights doctrine; it took the Supreme Court until 1963, however, to clarify how Indian reserved water rights might be quantified. In Arizona v. California,<sup>146</sup> the Supreme Court examined the water rights of the lower Colorado River Indian reservations in order to allocate the waters of the Colorado River. The Court reaffirmed the reserved water rights doctrine of the Winters case. In fact, the Court extended the doctrine to include Indian reservations established by executive order in addition to those created by Congress. The Court also extended the reserved rights doctrine to include other federal reservations, such as wildlife refuges, and maintained that the United States' intention was to reserve sufficient water to meet the needs of all reservations in the future as well as at the time they were created. Most importantly, the Court

approved the standard of "practicably irrigable acreage"<sup>147</sup> as one criterion to be applied in the quantification of reserved Indian water rights.

## 2. Other federal reserved rights

As has been previously indicated, the reserved rights doctrine has also been extended to public lands reserved for a particular governmental purpose. If Congress creates a park, national forest, wildlife refuge, military base, or other use of public land, the reservation of land also implies Congress' intention to reserve water sufficient to accomplish Congressional purposes. As is the case with Indian water rights, the priority date for the federal water right is the date the public land was withdrawn from the public domain or reserved for a particular purpose. The water need not actually be put to use; but, when it is, the use has priority over intervening rights created under a state system of prior appropriation. Reserved water is limited to the amount necessary for the reservation's specific purposes as set forth by Congress, the President, or other executive official at the time the reservation was created. Thus, in United States v. New Mexico,<sup>148</sup> which involved reserved water rights for a national forest created in 1899, the Supreme Court rejected the federal government's claims on water for wildlife, recreation, aesthetics, and stockwatering because the purposes contained in the Organic Act of the Forest Service, which created the reservation, included only insuring a timber supply and protecting watersheds.

## 3. Montana's Reserved Water Rights Compact Commission

The quantification of water rights assist a state in the management and development of its water resources. Adjudication of water rights within a river basin is typically handled by state officials through an administrative or judicial proceeding whereby all water rights are quantitatively determined and usage priorities assigned. Since the passage of the McCarran Amendment<sup>149</sup> in 1952, the federal government has waived its sovereign immunity and consented to being joined in state or federal court in general stream adjudications. Indian water rights were exempt from such state adjudications until 1976 when the Supreme Court

ruled in Colorado River Water Conservation District v. United States (Akin)<sup>150</sup> that the McCarran Amendment also enables state courts to adjudicate Indian, as well as federal, reserved rights as part of a comprehensive statewide adjudication process.

In 1973, Montana had passed a comprehensive Water Use Act<sup>151</sup> to adjudicate all water rights. Some Indian tribes felt this act might assert impermissible state jurisdiction over Indian water rights. In 1975, the United States filed suit<sup>152</sup> in federal court to adjudicate the reserved rights of the Northern Cheyenne and the Crow Indian reservations. By 1981, the United States had filed suits<sup>153</sup> for the remaining five reservations.

Encouraged by the Supreme Court's 1976 decision in Akin, however, Montana revised its Water Use Act in 1979 to create a state court adjudication process<sup>154</sup> for the comprehensive adjudication of water rights - including federal and Indian reserved rights. Also, in an attempt to resolve the problem of reserved rights, the state Legislature created the Montana Reserved Water Rights Compact Commission.<sup>155</sup> This nine-member commission has the authority to negotiate on behalf of the state and submit for legislative approval compacts with federal agencies and the Indian government. Any compact must be ultimately approved by the Legislature, the governing body of the tribe (in cases of Indian rights), and the Congress. So long as negotiations for a compact on federal and Indian reserved rights are being pursued in good faith, all proceedings to adjudicate those reserved rights in the state's general adjudication process are to be suspended until the compact has been ratified. If ratification has not been obtained by July 1985 (and the Legislature does not otherwise act), the suspension will terminate, federal and Indian claims will have to be filed in the state adjudications within 60 days thereafter, and the Compact Commission will cease to exist. Based on the Supreme Court's decision in Akin and Montana's subsequent creation of a statewide adjudication procedure, the federal district court dismissed the seven cases which the federal government had brought in behalf of the Indian reservations.



Montana and other western states, however, have provisions in their enabling acts and constitutions that purport to disclaim jurisdiction over Indian lands. In a 1979 case decided by the U. S. Court of Appeals for the Tenth Circuit,<sup>156</sup> the court held that such disclaimer provisions in New Mexico law did not deprive the state courts of jurisdiction to adjudicate Indian water rights. Yet, Montana's and Arizona's disclaimer provisions were litigated in appeals before the Ninth Circuit Court of Appeals in the cases of Northern Cheyenne Tribe v. Adsit<sup>157</sup> and San Carlos Apache Tribe v. Arizona.<sup>158</sup> The Ninth Circuit ruled that, based on the states' disclaimer provisions, Montana and Arizona did not have jurisdiction to adjudicate Indian water rights pursuant to the McCarran Amendment.

Because of the conflict between the Ninth and Tenth Circuits, the U.S. Supreme Court accepted the cases for review; and, in July 1983, ruled<sup>159</sup> that even in states where the enabling acts purport to disclaim state jurisdiction over Indian affairs, the McCarran Amendment allows state jurisdiction in the quantification of Indian water rights where a general stream adjudication is underway. In a footnote<sup>160</sup> however, the Court indicated that the state court is also the forum for determining whether, in a particular case, Indian water rights should be adjudicated in a state proceeding. On the basis of the uncertainty caused by this footnote, the Montana Attorney General has petitioned<sup>161</sup> the Montana Supreme Court for a writ of supervisory control so that an expeditious determination can be made as to whether state court adjudication of Indian and federal rights is appropriate.

After the formation of the Compact Commission, the seven Montana tribes and those federal agencies claiming water rights within the state were invited to participate in negotiations with the commission. Negotiations have been undertaken with the Northern Cheyenne Tribe, the Sioux and Assiniboine Tribes of the Fort Peck Reservation, the Assiniboine and Gros Ventre Tribes of the Fort Belknap Reservation, the Crow Tribe, the Rocky Boy's Chippewa-Cree Tribe, the Turtle Mountain Chippewa Tribe of North Dakota, and the U.S. Departments of Agriculture,



Interior, and Defense. The Flathead Tribes decided to terminate negotiations in May 1981, and the Blackfeet never agreed to enter.

The commission has not concluded any compact with a federal agency or a tribe. A proposed Fort Peck-Montana water rights compact had been scheduled for submission to the 1983 Legislature, but the Commission notified the tribe in April 1983 that the proposed compact would not be submitted for ratification. In part, this decision was due to serious concerns being raised by other state agencies about the terms of the agreement. In part, the decision was made to await the Supreme Court's decision in Adsit. Although the tribe itself had not approved the agreement, Fort Peck representatives have suggested that the state did not negotiate in good faith.

Montana's victory in the Adsit case no doubt has strengthened its bargaining position with the tribes. Since 1983, negotiations have been most active with Crow, Fort Peck, and Northern Cheyenne. It is uncertain whether the commission expects to submit proposed compacts to the 1985 Legislature.

#### 4. Implications for Montana's water policy, water marketing, and the interstate movement of water

Until quantified, Indian and federal reserved water rights share in creating great uncertainty for Montana, its government, and its citizens in the management of those waters. That uncertainty hampers the creation and implementation of a coherent and reliable state water plan, the reservation process,<sup>162</sup> and the attainment of other elements of state policy. The uncertainty is manifested in questions as to the quantity of water reserved and its priority date. Until such determinations are made, all potentially subordinate rights are clouded.

One significant difficulty with outstanding reserved rights is in obtaining the completion of the statewide adjudications of water rights. All nonreserved water claims were required to be filed by April 30, 1982; and the state water courts are expeditiously developing preliminary decrees. Judge Lessley, the Chief Water Judge, has vowed to complete all preliminary decrees by 1990. So long as reserved claimants are participating in negotiations with the Compact Commission, their

claims need not be filed. Upon cessation of negotiations, or if a compact has not been approved by July 1, 1985, the reserved claims must be filed with in the statewide adjudication process and treated similarly to all other claims.

The question posed for the 1985 Legislature is whether the life of the Compact Commission should be extended beyond July 1, 1985, and the negotiation process continued. If negotiations are extended beyond 1985, many preliminary decrees will remain subject to the quantification of reserved rights. At best, negotiated agreements might be expeditiously reached and incorporated into the decrees. At worst, the negotiation process might be open-ended with the possibility of protracted negotiations, deadlock, and years of subsequent litigation. If delay is the probable result of continued negotiations, it may be better policy to allow the commission to terminate and force reserved right claimants into the statewide adjudications. This action would accelerate any litigation that would eventually be filed. The state could remain willing to negotiate (through the Attorney General's office and DNRC) with any party. Both departments, however, would require the additional resources necessary to undertake this mixed litigation/negotiation strategy.

Outstanding federal and Indian reserved water rights claims may hamper the ability of the state to prepare for or participate in an interstate apportionment of the Missouri River. Outstanding claims make difficult the preparation of a state water plan - so important (as has been seen [supra p. IV-15]) in conducting equitable apportionment litigation. Outstanding claims may also interfere with the state's ability to develop a negotiating position vis-a-vis other states. If reserved claims are relatively small, Montana could agree to having those claims charged against its share under a negotiated interstate compact. If they are large, Montana would urge that they be charged against the entire basin.

Finally, uncertainty as to federal and Indian water rights interferes with the evaluation of water marketing proposals. Generally, these outstanding claims make more difficult the determination of

whether the state has surplus waters for sale and where they might be located. Specifically, Indian tribes themselves may become sellers and lessors of water - thereby competing with the state in the regional water market. The ability of Indian tribes to sell or lease for off-reservation use those waters that have been set aside for the tribes on the basis of potentially irrigable acreage is still legally uncertain. There is some precedence for off-reservation leasing of Indian water by the Papopos in Arizona and to the City of Los Alamos in New Mexico. The leasing of Indian water for on-reservation uses is more common.<sup>163</sup>

In conclusion, it may be in the best interests of the state to conclude as expeditiously as possible the equitable adjudications of reserved water rights. Certainly the state gains by its ability to proceed with informal water planning. The tribes and federal agencies may also gain by having actual specification of their water rights. But, state officials need also recognize their responsibility to the needs of Indians as state citizens. Indian tribes may have to overcome a cultural aversion to the notion of quantification of water and frequently lack the resources and expertise necessary to project water needs. The adjudication process must be sensitive to these concerns.

Everyone will gain by a conclusion of conflict over the issue. It is left to the 1985 Legislature, however, to resolve the difficult question of whether continuation of the Compact Commission and its work is the most expeditious route to the fair quantification of these rights.

#### F. State Water Planning

Section 85-1-203, MCA, which was originally passed in 1967 and revised in 1974, requires that DNRC formulate, and with the approval of the Board, adopt "a comprehensive, coordinated multiple-use water resources plan" for the state. The plan, which can be formulated and approved in sections, is required to set forth "a progressive program for the conservation, development, and utilization of the state's water resources and propose the most effective means by which these water resources may be applied for the benefit of the people."<sup>164</sup> The Section



requires that the plan be adopted only after properly noticed public hearings. The Section also requires that the plan be submitted to each general session of the Legislature.

The DNRC, underscoring the need for a dynamic plan, has indicated that the state water plan consists of various studies undertaken by the department over the last several years. These include:

- (1) Upper Missouri River Basin Level B Study Report and Environmental Impact Statement (March 1981)
- (2) The Future of the Yellowstone . . .? (January 1977)
- (3) Missouri River Basin Water Resources Management Plan (May 1980)
- (4) The Missouri River Water Resources Plan (August 1977)
- (5) The Flathead River Basin Level B Study of Water and Related Lands (1976)
- (6) Summary Report, Upper Missouri River Basin Cooperative Special Study, Montana (February 1982)
- (7) DNRC Inventory of Irrigable Land Resources of Montana (Updated periodically)
- (8) A Water Protection Strategy for Montana: Missouri River Basin (1982)

While Section 85-1-203 contemplates serial development and adoption of the components of the state water plan, only one component, the Flathead River Basin Level B Study, has been formally adopted through the public hearing, Board of Natural Resources and Conservation approval, and submittal to the legislative process specified by the statute. As has been discussed in Chapter 3 (supra pp. III-8-11), the preparation of such a plan may be very important to the state in an equitable apportionment litigation. The state's legal position would be weakened by a showing that it had not complied with its own procedures for the adoption and approval of such a plan.

#### G. State Water Development

Montana's Water Development Program was established by the Legislature in 1981. In addition to technical assistance provided by DNRC, the program provides money for water project construction through



(1) a \$1.5 million grant program funded by revenues from the coal severance tax;<sup>165</sup> (2) a \$5 million loan program funded by the proceeds of general obligation bonds;<sup>166</sup> and (3) a \$250 million loan program funded by revenue bonds and backed by the revenues from the coal severance tax.<sup>167</sup> The grant and smaller loan program are available to state agencies, local governments, and private parties. The larger loan program is available only to state agencies and local governments.

By law, all grants and loans must be approved by the Legislature pursuant to a plan submitted to each biennial session.<sup>168</sup> Since the 1983 session 18 grants totalling \$1.3 million, 23 projects totalling \$2.2 million through the smaller loan program, and 15 projects totalling \$10.5 million through the larger loan program have been funded.<sup>169</sup>

During the 1985 legislative session, the DNRC will be submitting its report for projects proposed over the next two years.

#### H. Montana's Water Reservation System

One element of Montana's water law and policy that is unique among the states is a statutory program that allows water to be reserved in the present for preferred uses in the future. Although adopted as part of Montana's comprehensive Water Use Act in 1973,<sup>170</sup> the water reservation traces its history to creation of the State Water Conservation Board (SWCB) in 1934. Recognition of the need to "preserve for Montana's prior right to use water for its projects as against claims which might subsequently be made for water used by downstream states" occurred as early as 1960 in a report submitted to the Legislature by the SWCB.<sup>171</sup> The board viewed its program, which had authority to file water appropriation documents on all unappropriated waters of the state for uses in future projects, as the state's investment in the development of its water resources.

The water reservation system serves as an important way to quantify and document potential uses as well as substantiate the viability of those potential uses. Montana's statewide reservation system allows state agencies, political subdivisions of the state (including municipalities and conservation districts), and the federal government to apply to the Board of Natural Resources and Conservation "to reserve

waters for existing or future beneficial uses or maintain a minimum flow or quality of water...."<sup>172</sup> The statute excludes industrial users from directly reserving water.

The board must grant or deny a reservation based on the following criteria:

- (1) the purpose of the reservation;
- (2) the need for the reservation;
- (3) the amount of water necessary for the purpose of the reservation; and
- (4) whether the reservation is in the public interest.

The only application of Montana's reservation system occurred in the Yellowstone Basin. The impetus for the Yellowstone reservations came from a flurry of applications for large quantities of water from energy companies in the early 1970s. In response, the 1974 Legislature, fearing potential dewatering of the free-flowing Yellowstone, adopted a moratorium that suspended applications for large quantities of water. During the moratorium, DNRC developed extensive studies, including an environmental impact statement (EIS), on the basin.

Over the next four years, the board conducted an extensive hearing and review process that resulted in the following reservations: (1) 5.5 million ac-ft for instream flows; (2) 655,324 ac-ft for future irrigation of 235,000 acres; (3) 60,913 ac-ft for municipal use; and (4) 1.2 million ac-ft for offstream storage.

Under the terms of the Yellowstone reservations each reservant must within three years submit a detailed plan identifying projects to be developed, including a list of accomplishments to date, a construction schedule and a schedule for putting the reserved water to beneficial use that specifies the timing of economic, engineering, soils, and other studies. Preliminary engineering plans must show the capacity, size, and location of the works. Because the application-permit procedure is bypassed, the reservant may commence construction on approval by the board of a detailed engineering plan. Upon review of either the preliminary plan or detailed plan, the board may approve, modify, or deny the plan on criteria that include the nonavailability of water,

inadequacy of the proposed diversion, incompatibility with local and regional planning efforts, failure to meet the basic interests of the people of Montana or the objectives of the reservation, noncompliance with state or federal laws or environmental standards, proposed uses not beneficial, or the failure of the plan to demonstrate adequate and reasonable conservation measures or to show that it is not reasonable and is speculative. The reservant is to submit an annual progress report to the board. At least once every ten years the board will review the plans to ensure that the objectives of the reservation are being met and may at that time extend, modify, or revoke the reservation upon findings that may include failure of anticipated demand to materialize, inadequate facilities, noncompliance with law, and use of the waters for other than beneficial use. The reservation is to be perfected within a set time; most of the reservants have until the year 2000, some until the year 2007.

The reservation system, although applied in only one basin to date, represents an essential tool in planning and managing the use of Montana's waters. How well reservations, as currently constructed, would serve to protect Montana's right to future water development in an interstate setting is an untested question. Chapter 5 explores the usefulness of the reservation system in the interstate arena in further detail (infra at pp. V-46-48).

#### I. The Public Trust Doctrine

The Montana Supreme Court has recently reached two decisions recognizing the public trust doctrine in Montana law. In both Montana Coalition for Stream Access v. Curran (Dearborn River)<sup>173</sup> and Montana Coalition for Stream Access v. Hildreth (Beaverhead River),<sup>174</sup> the court held that the public is entitled to recreational use of all of Montana's waters that are capable of such use. The limit of the public's right to use these waters is, under normal circumstances, the high water mark. The public may cross private property in order to portage around barriers in the water, but the portage must be accomplished in the least intrusive manner.



The public trust doctrine has had implications in other states besides as it affects the recreational use of the beds of lakes, rivers, and streams. Because the doctrine is new to Montana, it is difficult to predict how Montana courts will subsequently interpret and apply the doctrine. The purpose of this section is to describe the origin and content of the public trust doctrine, as well as to explore the possible implications the doctrine might have on water marketing and the interstate movement of waters.

1. Origin and content

The public trust is a longstanding doctrine having its roots in both civil and common law. The doctrine requires a high level of care (in essence, a fiduciary obligation) by government as it deals with the resources of "common heritage" or of "special character" within its jurisdiction.

Historically, the doctrine has been applied to protect public uses and access to and upon navigable waters for passage, commerce, and fishery. These roots, however, should not mislead policymakers as to how the essential purpose of the principle may be applied in contemporary situations. Although the doctrine evolved with respect to navigable waters and to economic and subsistence uses, the rationale behind the doctrine may equally apply to other natural resources and to guard more contemporary uses.

An important public trust case of the nineteenth century, which ultimately reached the U.S. Supreme Court, describes the application of the doctrine as well as indicates how it might apply to Montana's water situation. In 1869, the Illinois legislature granted to the Illinois Central Railroad 1000 acres of tidal and submerged land, representing virtually Chicago's entire waterfront. The railroad was only limited in that it could not obstruct the harbor or impair the public's right of navigation. Also, the legislature retained the right to regulate wharfage fees when docks were built.

Thinking better of the transaction, the legislature later rescinded the grant, and the legality of the rescission (with nothing more than incidental compensation) was upheld by the U.S. Supreme Court in



Illinois Central Railroad v. Illinois (1892).<sup>175</sup> The Court declared that one legislature does not have the power to "give away nor sell the discretion of its successor" to "exercise the powers of the State" in the execution of the trust and that legislation "which may be needed one day for the harbor may be different from the legislation that may be required at another day."<sup>176</sup> The Court did recognize, however, that some parcels on the waterfront could be granted free of trust as long as they furthered trust purposes.

Other applications of public trust considerations have been made in Massachusetts litigation to invalidate excessive delegations of authority to a private company to develop and operate a state park and ski area,<sup>177</sup> in Wisconsin cases to invalidate legislation which had authorized a private developer to drain a lake for a housing development,<sup>178</sup> and to deny local government power to use a fishing stream for incompatible electric power generation.<sup>179</sup> The public trust doctrine has also been asserted in a Pennsylvania ruling that, where destruction of a public resource is justified because of an overriding public purpose, there should be reasonable efforts of mitigation;<sup>180</sup> in North Dakota, where a court prevented the issuance of water appropriation permits for coal generation facilities until completion of a comprehensive water use plan that took into account instream uses such as navigation, commerce, and fishing;<sup>181</sup> and in a New Jersey Supreme Court decision recognizing the public's ancillary rights of both reasonable access to and use of privately owned portions of beach areas to enjoy tidelands.<sup>182</sup> In a 1984 decision, the Idaho Supreme Court recognized the public trust doctrine in that state but upheld a grant by the state lands department of the issuance of a lease to a private club for the construction of a private docking facility on a navigable lake (on the basis that a fee simple interest was not being conveyed).<sup>183</sup>

The California Supreme Court's decision in National Audubon Society v. Superior Court<sup>184</sup> (discussed supra p. II-7), however, is the most sweeping declaration of public trust considerations. There, the court held that the public trust doctrine applies so as to protect the navigable waters of Mono Lake from harm caused by diversion of

non-navigable tributaries to meet the water needs of Los Angeles. The court indicated that the doctrine protects changing public needs for ecological preservation, open space maintenance, and scenic and wildlife needs - as well as the traditional concerns of navigation, commerce, and fishing. The court indicated that the state, as public trustee, has a continuing duty to protect the people's common heritage of streams and lakes through continuing administration of the trust. Read broadly, the decision may mean that water rights under California's appropriation system can never be acquired independently of the public trust. Courts and the state's water agencies have concurrent jurisdiction to determine whether public trust considerations have been satisfied, and the California State Water Resources Control Board is now applying public interest criteria to its permitting functions.

As previously indicated, the Montana Supreme Court, in its Curran and Hildreth decisions, has applied the public trust doctrine to stream and streambed access. It is too early to determine how the doctrine may be applied in subsequent cases. It is important, however, to recognize that the Montana Supreme Court also based its holdings on Article IX, Section 3 of the Montana Constitution: "All ... waters ... of the state are the property of the state for the use of its people ...." Thus, with the linkage of these two doctrines in the same decisions, the court seems to recognize that particular scrutiny will be applied to water management decisions involving publicly important waters. For this reason, public interest considerations are analyzed for each level of policy options for the Legislature set forth in Chapter 5.

## 2. Implications

As the committee has been specifically empaneled to study the desirability and feasibility of in-state and out-of-state marketing of water, it is necessary to speculate what implications the public trust doctrine might have for such proposals, in specific, and for other policy options, in general.

### a. Implications for water marketing

The public trust implications for marketing probably are different dependent on (1) whether the marketing is of currently appropriated or

unappropriated waters; (2) the type of diversion; and (3) who does the diversion.

If currently unappropriated waters are sold, the public trust doctrine may have prospective application requiring that important public uses of the water be protected. If the waters are currently being used for navigation or recreational purposes, if fragile ecological systems depend on the present flow of the water, or if the flow is low or unstable, only minimal diversions may be tolerated under the doctrine. The use of the proceeds from water sales may influence whether a court will allow significant interference with public rights in the waters. If the proceeds from the sales are invested back into the resource (e.g., recreational facilities elsewhere, wildlife habitat protection) or dedicated to a permanent "heritage"-type trust fund, a court probably would be more inclined to approve diversions that interfere with existing public rights. At present, DNRC has the opportunity to apply the public interest criteria of MCA § 85-2-311, which address many of these concerns, to permit applications.

The sale and diversion of existing appropriated rights involve a change-of-use application processed with DNRC.<sup>185</sup> These change of use applications must be approved as long as they do not cause injury to others. The public trust doctrine may require that DNRC review a change-of-use application with greater scrutiny for potential interference with public rights. Also, it has been argued<sup>186</sup> in the wake of the Mono Lake decision that the doctrine imposes an affirmative obligation on state permitting agencies such as DNRC to review existing appropriations for interference with public trust uses and to modify or rescind an appropriation or change of use when it becomes destructive to public interests.

The type of diversion facility used for a water marketing program is also important in calculating public trust considerations. If a reservoir is built on the mainstem to capture water for sale and diversion, the construction might interfere with fish and wildlife habitat; free navigation including rafting, canoeing, and fishing; and other public uses. Reductions in downstream flows after reservoir



construction might still be sufficient to satisfy existing appropriated rights but could damage similar downstream public uses.

Offstream storage for marketing and diversion purposes would seem to fare better under public trust scrutiny. While sufficient water must be left in the stream for public purposes, the possible destruction of public uses and natural values by submersion is removed.

Who does the diversion is another issue. When adopted by a state, the doctrine has relevance to attempted or existing diversions from publicly important streams or lakes by individual, local, or state appropriators. The difficulty arises, however, when the diversion is proposed or has been accomplished by a federal agency or by an Indian tribe in exercise of their reserved water rights. Even when permit applications and adjudications involving federal water rights take place in a state forum, a state public trust doctrine must yield to federal law under the supremacy clause,<sup>187</sup> and it is unclear whether there is a federal public trust doctrine.<sup>188</sup> Some federal statutes, however, allow state law to control federal diversions. For example, Section 8 of the Reclamation Act allows state law to govern diversions by the Bureau of Reclamation unless "inconsistent with clear congressional directives."<sup>189</sup> In this case, a state-recognized public trust doctrine could conceivably apply to limit or condition federal projects or diversions.

More clearly, the doctrine prevents total "privatizing" of publicly important waters. Only under narrow circumstances (e.g., to benefit the resource) can the state transfer away those waters. Thus, the doctrine makes difficult a truly free market of water rights. Nor can a state escape public trust scrutiny when it seeks to act as a market participant<sup>190</sup> by appropriating certain waters for its own use or for sale to other parties.

b. Implications for other water policy options

The public trust doctrine poses questions for other water policy options as well - particularly those surrounding Montana's circumstances in the Missouri River Basin. If Montana needs or reserves certain waters to secure public trust purposes (usually instream values), will



that use or reservation be recognized or honored in an interstate apportionment of Missouri River waters? If Montana later seeks to put some of these waters to consumptive use, does the water right or reservation lose interstate priority? If downstream states also adopt the public trust doctrine, can Montana appropriate and put to consumptive use water necessary to serve those downstream public purposes?

There are no easy answers to these questions. If interstate apportionment comes about through Congressional action or interstate compact, recognition for Montana's public trust needs will depend in large part on political leverage and how convincing the state is in articulating the needs as integral to Montana's water policy. If interstate apportionment is attempted through U.S. Supreme Court litigation, however, the situation is more uncertain. The court has ruled that the principles of prior apportionment will generally apply in an interstate equitable apportionment action. Thus, it is possible that Montana's public trust waters would not receive Supreme Court acknowledgment against appropriations by downstream states.



## CHAPTER 5: STATE STRATEGIES

The 1985 Legislature and subsequent legislatures will face the task of developing and articulating a water policy for the State of Montana. Such issues as water marketing, coal slurry, and water exporting are only subsets of such a general water policy.

The development of such a water policy does not necessarily require affirmative action by the Legislature. To do nothing - retain the status quo - is itself a water policy. It is also a legitimate water policy as long as the Legislature has had sufficient opportunity to deliberate and appreciate the consequences of doing nothing. Also, events and policies in other areas (e.g., land use planning) may have even greater influence on water policy than what Montana does with its water law.

This chapter sets forth four sets of water strategies for the Legislature to consider. These strategy sets are identified as "Level 1" through "Level 4 Responses" depending on the breadth of the actions proposed. The four strategy sets, or levels of response, are as follows:

- Level 1 Response - Do nothing
- Level 2 Response - Undertake a "minor tune-up" of existing statutes
- Level 3 Response - Develop a water marketing program
- Level 4 Response - Develop a state strategy to maximize Montana's fair share of Missouri River Basin water

The development of these strategies has been triggered by the coal slurry, water exporting, and water marketing issues; but some of these strategies, especially "Level 4", go beyond these more specific concerns to address what should be the features of a comprehensive state water plan.

By this listing of possible strategies, the committee has endeavored to stimulate public and legislative discussion of what is possible as policymakers begin to frame Montana's water policy for the future. But a listing of possible strategies is not enough. It is also

important to develop a set of criteria by which the individual strategies can be evaluated. As a result of its deliberations, the committee suggests the following criteria by which all policy proposals should be judged:

How well does the proposed strategy ...

1. Protect existing consumptive uses?
2. Protect anticipated future consumptive uses in the state?
3. Protect instream values, water quality, and the public trust interest in the waters?
4. Maximize for the benefit of the state and its citizens the economic value of the waters?
5. Protect and enhance intergovernmental, interstate, and state/tribal relations?
6. Lend itself to administrative feasibility?
7. Lend itself to political feasibility?

The committee has applied this set of criteria to each of the four sets of possible policy responses. In doing so, this comparative and evaluative process has helped the committee in formulating its specific recommendations, which are set forth in Chapter 6. The committee urges other legislators and the interested public to debate policy proposals utilizing these criteria as well. A vigorous dialogue around a shared framework will facilitate and improve the decisionmaking process.

These seven criteria are important for a more fundamental reason. The committee believes that, in reworded fashion, they express the desired goal for the state in the management of its water::

It is the goal of the State of Montana to protect the quality of our waters, both surface and groundwater, as well as the ecological systems, instream uses, and other public interests dependent upon them; to guarantee existing and necessary future consumptive uses of the waters; to maximize for the benefit of the state and its citizens the economic values of those waters; to maintain and improve relations with other states, the federal government, and Indian tribes in issues concerning water; and to undertake all of the foregoing in an administratively sound and



politically responsible manner.<sup>192</sup>

The remainder of this chapter is divided into a discussion of each of the four levels of responses the state might wish to consider. Each set of strategies is evaluated with reference to the seven-part criteria. In the next chapter, the best features of all the strategies are extracted to prescribe what the committee believes to be the most advantageous policy for Montana's future.

A. Level 1 Response: Do Nothing

In the 1985 session, the Legislature can choose to do nothing affirmative about the water issues facing this state; and that inaction will be in itself an expression of state water policy. Certain consequences of such inaction, principally around the water export ban, the limited marketing program authorized by the previous legislature, and the negotiation of federal and Indian reserved water rights, will follow. Inaction is not, in itself, bad - as long as legislators are completely apprised of the consequences of their inaction. This section addresses the consequences of doing nothing in two categories: (1) those consequences related to water marketing and exporting; and (2) those consequences related to maximizing Montana's fair share of water in the Missouri River Basin. The section also sets forth an evaluation of this policy option with reference to the criteria itemized at the beginning of this chapter.

1. Consequences related to water marketing and exporting

In 1983, the 48th Legislature acted (1) to repeal temporarily the provisions of MCA § 85-1-121, which had banned the exporting of Montana water without legislative approval; (2) to amend temporarily the provisions of MCA § 85-1-205 so as to allow the acquisition by the state of water from any federal reservoir, not just Fort Peck, for subsequent resale, lease, or distribution; and (3) to amend temporarily the provisions of MCA § 85-2-311 to specify public interest criteria for the issuance of water permits. By the terms of HB 908, these temporary features are to expire automatically on June 30, 1985. The intent of HB 908 was to revive, on July 1, 1985, the previously existing statutory

language in each of the three sections unless the 1985 Legislature enacts otherwise.

The "revival" of the previous law may not be as easy as one would think. The uncertainty results from a 1983 United States Supreme Court case, Chada v. Immigration and Naturalization Service,<sup>193</sup> concerning the constitutionality of the legislative veto and the separation of powers. By analogy to the reasoning of this case, automatic revival of the three sections temporarily modified or repealed in 1983 may not result.

Chada involved a provision of federal immigration law that granted Congress the power to veto immigration applications without Presidential concurrence. After Congress had disapproved his immigration application, Chada sued on the basis that the legislative veto violated the constitutional requirement, contained in Article I, Section 7, that the President have the opportunity either to sign or veto bills passed by the Congress. Chada contended that the Congressional veto had denied him this prerogative, and the U.S. Supreme Court agreed.

Although there are no Montana cases on this exact point, a similar argument could be based on Article III, section 1, of the Montana Constitution which prohibits one branch of government from exercising the powers of another, and Article VI, section 10, which gives the governor the veto power. This argument would maintain that the automatic "revival" of the law is not "revival" at all but the creation of law where, at least for a two-year period, there was none before. As a result, the governor is deprived of the opportunity to exercise his constitutional role to participate in the process.

A persuasive argument can be made, however, that the "revival" situation is different from the Chada problem. First, when originally passed, the provisions of the pre-existing law were presented to the governor for his signature or rejection. Second, when the governor signed HB 908 into law on April 29, 1983, he had the additional opportunity to pass on the merits of the legislation - including the provisions reviving the pre-existing law on July 1, 1985. Thus, unlike the Chada situation where executive participation was precluded, the

governor has been integrally involved in the legislative process resulting in the restatement of the earlier provisions of law.

A companion argument supporting the legitimate revival of the statutes is that no one but the Governor has judicial standing to object to the revival. After all, it is his constitutional prerogative that is arguably jeopardized. A similar argument was raised in the Chada case and rejected. The court ruled that where third parties have a stake in the process, such as in an application for immigrant status or in an application for a water permit, they are also entitled to a constitutionally correct legislative process.

Consequently, it is a close call as to whether the pre-existing statutory language can be revived. The committee believes that a successful constitutional defense of the revival could be made. Yet, the uncertainty caused by this unique legislative posture, coupled with the risk of losing (which would mean having no water permitting criteria on the books), requires legislative action in 1985. In short, if the Legislature desires to return to the pre-1983 status quo, it cannot "do nothing"; it should "do something." Thus, it is the committee's recommendation that, if the Legislature desires to return to the law existing before 1983, the pertinent portions of MCA § 85-1-121, 85-1-205, and 85-2-311 should be affirmatively re-enacted during the 1985 session with an emergency provision making them effective as of July 1, 1985. Otherwise, Montana will have questionable provisions concerning the criteria for the issuance of permits, the purchase of water from federal reservoirs, and the export of water from the state.

Assuming that the pre-existing law is re-enacted in a desire to return to the pre-1983 status quo, what are the consequences? Pertaining to water marketing and exporting, there are several:

1. The Department of Natural Resources and Conservation will have the authority, under MCA § 85-1-204, to market impounded water; but, the source of water would have to be from Fort Peck (due to the return to pre-existing MCA § 85-1-205) or state reservoirs. Also, due to the state constitutional obligation of state officials to enforce the laws



of the state,<sup>194</sup> even those constitutionally suspect, the DNRC would be prevented from marketing water out-of-state.

2. While the anti-export ban would return to the law books, the provision is probably unconstitutional. Thus, in defiance of the ban, already appropriated ground or surface waters could be transferred out-of-state; pre-1973 use rights could be transferred out-of-state; and none of the consideration for these sales would flow to the state.

3. In the event the DNRC is forced, on the basis of the anti-export ban, to deny a water permit application from a party who desires to export water for beneficial use out-of-state, the denial could well be appealed to district court. If the state is unable to maintain the constitutionality of the statute, which is likely, the applicant would be entitled to an award of attorneys fees under MCA § 85-2-125. As is well known, attorneys fees awards against states in recent years have been sizable.

4. Indian tribes with federal approval in the state could possibly sell or lease their water to out-of-state customers. State regulation would be limited to the off-reservation effects of such water movement (e.g., a pipeline). Thus, the state could not regulate the water directly but only indirectly through an environmental impact statement or the Major Facility Siting Act, if applicable.

5. Also, in certain instances, water in the Yellowstone Basin could be moved to other states signatory to the Compact in spite of the anti-export ban (so long as the water stayed in the basin).<sup>195</sup>

## 2. Consequences related to Montana's share of Missouri River Basin Water

The consequences of a Level 1, "do nothing," response are generally benign as to Montana's interest in maximizing its share of Missouri River Basin water. That is to say, "doing nothing" certainly is not a vigorous pursuit of a maximum water share. And, as time goes on, the status quo probably works against Montana's long-term interest. Montana will probably develop its water at a rate slower than downstream states; and, as those states do so, their equitable position improves. By continuing to rely on a suspect statute to keep water within its



boundaries, the state risks having insufficient regulatory protection over water rights acquired in the interim. (For instance, although New Mexico's limited exporting statute has recently been upheld by the court, the court ruled it was not applicable to existing permittees who are now free to transfer their water out-of-state.<sup>196</sup>) Also, to the extent that Montana needs to protect its water by putting it to use, the failure to pursue water marketing removes one potential source of funds for such water development.

### 3. Evaluation of Level 1 response

A Level 1 policy response seeks to restore, as completely as possible, the situation that existed prior to the 1983 legislative session. The characteristics of that situation are a ban against the exportation of water, a ban against coal slurry, less rigorous permit criteria, and less flexibility for the state to market water.

Such an outcome is difficult to justify as a coherent, internally consistent statement of policy. The desire for returning to the pre-1983 law may be based on environmental considerations: saving Montana's water, preventing the environmental impacts of pipeline construction and operation, or purposefully retarding the rate of coal development. The probable results likely do not serve these ends.

The ban against the exportation of water is likely to be struck down thereby freeing existing permittees, who may have obtained their rights outside the public interest criteria, to transfer their water out-of-state. Also, the federal government and private permittees are even now able to sell their water; and, if the anti-export ban were struck down, they could do so interstate with none of the revenues flowing to the state. Additionally, even if the ban proves effective to prevent the out-of-state sale of any Montana water, 17 million ac-ft/yr of Missouri water leaves the state annually - water in which lower basin states continue to develop their own rights.

The ban against water-based coal slurry pipelines, although on firmer constitutional footing, may also be struck down. In any case, both coal, using another medium, and water (by itself or mixed with other substances) can even now be moved legally by pipelines. Those

type of pipelines, as well as others for oil, gas, and other commodities can be constructed now without the environmental scrutiny of the Major Facility Siting Act (unless those pipelines directly link energy facilities.<sup>197</sup>) Also, the transportation of coal out-of-state for consumption may be less environmentally damaging than its combustion within the state.<sup>198</sup>

Both bans probably do retard the development of coal. If, as some argue, the transport of coal by slurry is less expensive than by rail, or at least if transportation charges would be reduced through competition between the two modes, Montana's coal would be more competitive and in greater demand - therefore leading to development deemed undesirable by some.

Concern for a return to the pre-1983 laws may also be justified on economic grounds. For instance, the state - hit by reduced rail service and line abandonments following deregulation - may wish to ensure the health of the railroads serving the state by protecting those carriers from competition in the transport of highly profitable commodities. Yet, it is unclear whether cross-subsidization is necessary in ensuring adequate railroad service in the state. It is also unclear whether railroads need the assistance (as evidenced by the recent long-term coal delivery contracts signed by railroads which underbid ETSI and other potential carriers.)

The coal slurry ban also prevents the construction of taxable facilities in the state, the development of related jobs, and the secondary economic benefits of new industry. Also, as previously mentioned, water sales can already take place and if the anti-export ban is declared unconstitutional (with the state potentially liable for its own attorney fees and those of the prevailing party), they could take place interstate. The revenues from such sales would not flow to the state. Thus, it is difficult to conclude that return to the pre-1983 situation would economically benefit the state.

Returning to the pre-existing law also might be suggested as a means for protecting existing and future uses of Montana's water. As has been seen in our discussion of the Sporhase case, (supra at pp.

II-3-5) there is no such thing as "Montana's water" as a matter of constitutional law, unless the state puts water to use or reserves it in a reasoned, well-documented fashion. A Level 1, "do nothing" response probably presents minimal danger to existing rights but, in absence of adequate planning for the future, does endanger Montana's claim to water for future needs. And, as time goes on, lower states develop their own equities in the water.

Finally, return to the pre-1983 law probably cannot be justified on the basis that it is politically desirable to avoid controversy by maintaining the status quo. As the pre-existing sections may need to be re-enacted to be effective, political discussions over these issues may be reopened in any event.

A Level 1 response appears deficient in these major instances. The old adage seems particularly relevant: you cannot step into the same stream twice. Table 7 evaluates how the strategy satisfies the other criteria set forth in the beginning of the chapter. The committee's recommendations as to this strategy are set forth in Chapter 6.

B. Level 2 Response: Minor "Tune-up" of Existing Statutes

In 1985, the Legislature could also undertake the next higher level of response to the water issues facing Montana. That response would be a minor "tune-up" or "fine-tuning" of existing law, and could have as many as three components: (1) revising the anti-export ban as it pertains to water; (2) repealing the coal slurry ban and regulating coal slurry pipelines in another manner; and (3) seeking a Congressional reversal of the Supreme Court's decision in Sporhase v. Nebraska. This section describes the three components and evaluates, using the criteria set forth earlier in the chapter, the consequences of a response on this level.

1. Constitutionality of the ban against water exportation

For the reasons set forth in Chapter 4 (supra at pp. IV-5-10), the committee concludes that Montana's ban against the exportation of water (MCA § 85-1-121), which was effective until April 29, 1983, and which is scheduled to "revive" on July 1, 1985, is unconstitutional. As the first step in a Level 2 response, the Legislature should prevent it from



TABLE 7:  
Evaluation of Level 1 Response:  
Do Nothing

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How well does a Level 1 response . . .

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Protect existing consumptive uses?

Moderate level of protection through completion of general stream adjudications on schedule now contemplated

Low level of awareness of other consumptive rights being established in Basin which might compete with Montana uses in any equitable apportionment action

Protect Montana's anticipated future consumptive uses?

Relying on DNRC and local governments to institute reservations provides low to moderate level of protection from claims of other states

Water development "as usual" provides moderate level of protection from claims of other states

Continued reliance on fragmented water data system delays state responses to changed circumstances and retards development of Basin strategy

Protect instream values, water quality, and the public trust interest in the waters?

Slow water developments results in high instream flows, at least over the short-term

Relying on DNRC and local governments to institute reservations provides low to moderate level of permanent protection for instream values

Return to the permit criteria of old MCA S 85-2-311 permit criteria reduces scrutiny of applications for their impact on state and public interests

Coal slurry ban, so long as it is upheld, prevents de-watering of some streams

Maximize for Montana's benefit the economic value of the waters?

Certainty of existing water rights must await normal completion of general stream adjudications and negotiation of federal and Indian reserved rights



State water marketing limited to Fort Peck Reservoir and state facilities

To extent state does not actively market water under existing authority, other potential sellers (federal government, Indian tribes, and private firms) have unchallenged access to whatever market exists; whatever revenues produced go to those sellers (in essence, state has provided wholesale commodity for free)

State foregoes economic value from construction of coal slurry pipeline and related works (e.g., jobs, taxes, multiplier effects)

Protect and enhance intergovernmental, interstate, and state/tribal relations?

Overt conflicts with other states, tribes, and federal government minimized or avoided over short-term; underlying tension and conflict resulting from uncertainty as to rights remains and festers

Lend itself to administrative feasibility?

Moderately easy to administer as it is existing practice; yet, effectiveness of state water managers limited by fragmented data and uncertainties as to federal, Indian, and private water rights

Lend itself to political feasibility?

Maintenance of the status quo is always the most feasible political alternative; to extent, public interest criteria and anti-export of water ban must be re-enacted to avoid Chade-type problem, political controversy over these sections is also reopened

coming back into effect on July 1, 1985. The more important question facing the Legislature, therefore, is what policy should be substituted in its place?

The committee has received favorable public comment concerning the temporary provisions of MCA § 85-2-311, which enlarged upon the earlier criteria for the issuance of water appropriation permits. In general, such provisions can safeguard many of the state's concerns about the export of water and coal slurry pipelines.

Upon the recommendation of DNRC, however, the committee suggests that these additional public interest criteria apply to diversions in excess of 4000 ac-ft/yr and 5.5 cfs rather than 10,000 ac-ft/yr or 15 cfs, as is the threshold under existing law. Regulation on the basis of ac-ft/yr or cfs resulted in the application of the public interest criteria to relatively small quantities of water used during a concentrated period of time.

DNRC believes, and the committee concurs, that 4000 ac-ft/yr and 5.5 cfs is the more appropriate threshold for application of public interest criteria. As Table 8 indicates, regulation at this level would have brought 56 additional applications under the public interest criteria had temporary MCA § 85-2-311 been in effect between 1973 and 1983.

The committee also believes special public interest criteria for the out-of-state movement of water need to be developed under the opportunity for state control left by the Sporhase decision. Importantly, the provisions of MCA § 85-2-311 parallel in some respects the content of New Mexico's new statute, "Applications for the Transport and Use of Public Waters Outside the State,"<sup>199</sup> which was recently approved by the New Mexico Federal District Court.<sup>200</sup> The statute was passed in February 1983 in response to the court's invalidation<sup>201</sup> of New Mexico's earlier, absolute bar against interstate movement of groundwater. To the extent that the provisions of Montana's statute do track those of the New Mexico law, there is some assurance of their constitutionality. New Mexico's statute also contains some provisions

TABLE 8:  
Water Use Permits Issued Between 1973 and 1983  
Exceeding Various Size Criteria

TYPE OF USE																	
	Agriculture				Fishery				Hydropower				Municipal				Totals
CRITERION																	
YEAR	A	B	C	D	A	B	C	D	A	B	C	D	A	B	C	D	
1973	5	1	1	1									1	5	1	2	
1974	11	1	1	1					1	1	1	1		12	2	2	
1975	20												3	20		3	
1976	14		1	1	2	1	3	4						16	1	5	
1977	3		1	2	1	1	4	5					1	4	1	8	
1978	3			1	1		1	1			1	2		4	2	4	
1979				1	1									0		1	
1980					1						1	1		1		1	
1981	8			1					1	1	2	3		9	1	4	
1982	4			1					4	5	8	9		8	4	10	
1983	1								7	5	10	10		6	8	16	
TOTALS	69	2	4	8	5	2	9	11	13	12	23	26	11	87	16	56	

Note: Size criteria:

A - Permits over 10,000 ac-ft/yr or 15 cfs

B - Permits over 10,000 ac-ft/yr and 15 cfs

C - Permits over 5000 ac-ft/yr and 7 cfs

D - Permits over 4000 ac-ft/yr and 5.5 cfs

Source: Montana Department of Natural Resources and Conservation (Jan. 1985).

which are absent in Montana's scheme but which should be considered by the Legislature.

As can be ascertained from the title, New Mexico's statute deals specifically with the interstate movement of water. Montana's statute concerns appropriations for both in- and out-of-state uses. Both approaches have advantages. The New Mexico version allows the restraints on interstate movement of water to be specifically tailored; and its constitutionality has been upheld by the trial court. Montana's version, while even-handed in its consideration of intrastate and interstate appropriations (which is of value in constitutional litigation), is less able to address the specific concerns about the interstate movement of water. For example, if an applicant proposed an interstate diversion of less than 10,000 ac-ft/yr, or less than 15 cfs, he would have to comply only with the threshold requirements of MCA § 85-2-311 and would not, most importantly, have to demonstrate that the diversion would not be damaging to existing or projected instate demands for the water.

Another example: it can be argued that an applicant could secure departmental and legislative approval for the instate, consumptive use of more than 10,000 ac-ft/yr (or more than 15 cfs) and, at a later date, process a change of use application under MCA § 85-2-402. In response to such a filing, only the department is involved in the decision, and it "shall approve the proposed change if it determines that...[it] will not adversely affect the water rights of other persons." - thus escaping any inquiry as to whether there are reasonable, alternative sources in the other state as well as the need, in cases of large consumptive diversions, for legislative approval. New Mexico addresses these concerns nicely by applying such criteria to all out-of-state diversions.

As previously described, Montana's statute is three-tiered and contains: (1) permit criteria pertaining to appropriations less than 10,000 ac-ft/yr and 15 cfs; (2) additional criteria governing appropriations more than 10,000 ac-ft/yr or more than 15 cfs; and (3) for diversions for consumptive uses of more than 10,000 ac-ft/yr or 15



cfs, the additional requirement that the Legislature affirm the findings of the department. New Mexico's statute simply sets forth for out-of-state diversions the finding the state engineer must make in approving an interstate application and the factors he must consider in making his findings. The criteria contained in both the Montana's and New Mexico laws are compared in Table 9.

The committee believes that the inclusion of many of the New Mexico provisions into the Montana statute, particularly the last five on Table 9, would help to "fine-tune" and strengthen Montana's scheme. The committee also believes that these criteria should also apply to change of use applications. In particular, if the Legislature desires to undertake a "Level 2" response to these issues, the committee recommends the re-enactment of temporary MCA § 85-2-311 with the inclusion of new language which would impose the following criteria on any application for the out-of-state movement of water in addition to those now contained in § 85-2-311:

1. whether there are water shortages in Montana;
2. whether water subject to the application could feasibly be transported to alleviate shortages in Montana;
3. consideration of the supply and sources available to applicant in the state of destination;
4. consideration of demands placed on applicant's sources and supply in state of destination;
5. empowering DNRC to condition the permit to insure that the use of water in the destination state is subject to the same regulations and restrictions that may be imposed in Montana; and
6. requirement of the appointment of an agent within Montana for notice and service of process.

With passage of legislation substantially containing this language, the committee is optimistic that Montana will be able to assert the control over its waters relative to its interests in those waters. In this fashion, the statute should pass constitutional muster.

**TABLE 9:**  
**Comparison of Montana and New Mexico**  
**Public Interest Criteria**

<u>Montana [MCA S 85-2-311 (Temp)]</u>	<u>New Mexico (Stat. Ann. S 72-12B-1)</u>
Unappropriated waters available	Supply of water available to New Mexico
Rights of prior appropriator not affected	Would not impair existing water rights (finding)
Proposed means of diversion, construction, and operation adequate	NA
Proposed use is beneficial use	Addressed in other provisions of law; state engineer can require that water be subject to same regulations and restrictions that may be imposed on water in New Mexico
Will not interfere unreasonably with other planned uses for which permit has been issued or for which water has been reserved	Consideration of water demands of New Mexico
For appropriations more than 10,000 ac-ft/yr or 15 cfs: will be reasonable use based on consideration of : <ul style="list-style-type: none"> <li>-existing water demands and projected demands including water reservations</li> <li>-benefits to applicant and Montana</li> <li>-economic feasibility of project</li> <li>-effects of water quality, quantity, and potability of existing uses</li> <li>-effects on saline seep</li> <li>-probable significant environmental impacts (as determined by an EIS)</li> </ul>	Consideration of water demands of New Mexico
NA	Whether there are water shortages in New Mexico
NA	Whether water subject to application could be feasibly transported to alleviate water shortages in New Mexico
NA	Water available to applicant in state of destination

Montana [MCA S 85-2-311 (Temp)]

New Mexico (Stat. Ann. S 72-12B-1)

NA

Demands on applicant's water in state of  
destination

NA

Designation of agent for notice and service  
of process in New Mexico

## 2. Alternatives to the coal slurry ban

From the discussion set forth in Chapter 4, it is uncertain whether the statutory ban against water-based coal slurry pipelines is constitutional under the interstate commerce clause. The possible consequences of the ban being judicially struck down are that a pipeline company could appropriate water without any consideration payable to the state. Also, the pipeline could be constructed without significant, comprehensive state regulation. The only comprehensive state regulatory coverage would be the preparation of an environmental impact statement under the Montana Environmental Policy Act<sup>202</sup> (only in the event that the permitting activities of other state agencies constituted a "major action of state government significantly affecting the quality of the human environment"<sup>203</sup> the need for permits from the Department of State Lands (for crossings of state lands and navigable rivers), from the Department of Highways (for crossing of highways), from the Department of Fish, Wildlife and Parks (for enforcement of the Streambed Protection Act), and the Department of Health and Environmental Sciences (concerning water quality for temporary discharges).

In the event the Legislature determines that the coal slurry ban contained in MCA § 85-2-104 is unconstitutionally suspect or that, for policy reasons, the ban should be rescinded, the committee recommends that one or both of the following steps be considered. First, if the Legislature desires to allow the construction and operation of coal slurry pipelines on the same basis as other pipelines, the Legislature needs only to repeal Section 85-2-104.

If, however, the Legislature seeks either to discourage or regulate more closely coal slurry pipeline construction, the other two steps may be appropriate: to place such pipelines under the provisions of the Major Facility Siting Act (MFSA),<sup>204</sup> and/or to deny such pipelines the eminent domain power they would be entitled once the coal slurry ban were removed. These two suggestions further somewhat different purposes. Coverage under the Siting Act would emphasize strict environmental review while incidentally discouraging such pipeline construction. The denial of eminent domain power would provide no



additional environmental review but would very much discourage pipeline construction. A discussion of the rationale and consequences of these two proposals follows.

a. Coverage under the Major Facility Siting Act

Montana's Major Facility Siting Act requires that a major facility (usually an energy-related facility) obtain a certificate of environmental compatibility and public need from the Board of Natural Resources and Conservation prior to construction.<sup>205</sup> The certificate is considered by the board only after an extensive application has been submitted with an opportunity for federal, state, and local governmental agencies, as well as the general public, to comment on it. The application also receives a thorough evaluation from DNRC, which forwards its recommendations to the board.

Coverage by the MFSA results in a comprehensive review by the Board of numerous environmental and economic considerations - many of which would be important in the event coal slurry or complete pipeline coverage is sought. Specifically, the Board, prior to the issuance of a certificate, must find and determine:

1. the basis of the need for the facility;
2. the nature of the probable environmental effect;
3. that the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives;
4. a detailed set of environmental factors (see Table 10);
5. for electric, gas, or liquid transmission lines or aqueducts, what part will be underground; that the facility is consistent with regional plans for expansion of the appropriate grid of the utility systems serving the state and interconnected systems; and that the facility will serve the interests of utility system economy and reliability;
6. that the location of the facility conforms to applicable state and local laws and regulations;
7. that the facility will serve the public interest, convenience, and necessity;

**TABLE 10:  
Environmental Factors to be Considered  
Under Major Facility Siting Act  
(MCA S 75-20-503)**

**Energy Needs:**

- Growth in demand and projections of need
- Availability and desirability of alternative sources of energy
- Availability and desirability of alternative sources of energy in lieu of the proposed facility
- Promotional activities of the utility which may have given rise to the need for this facility
- Socially beneficial uses of the output of this facility, including its uses to protect or enhance environmental quality
- Conservation activities which could reduce the need for more energy
- Research activities of the utility of new technology available to it which might minimize environmental impact

**Land Use Impacts:**

- Area of land required and ultimate use
- Consistency with areawide state and regional land use plans
- Consistency with existing and projected nearby land use
- Alternative uses of the site
- Impact on population already in area, population attracted by construction or operation of the facility itself
- Impact of availability of energy from this facility on growth patterns and population dispersal
- Geologic suitability of the site or route
- Seismologic characteristics
- Construction practices
- Extent of erosion, scouring, wasting of land, both at site and as a result of fossil fuel demands of the facility
- Corridor design and construction precautions for transmission lines or aqueducts
- Scenic impacts
- Effects on natural systems, wildlife, plant life
- Impacts on important historic architectural, archeological, and cultural areas and features
- Extent of recreation opportunities and related compatible uses
- Public recreation plan for the project
- Public facilities and accommodation
- Opportunities for joint uses with energy-intensive industries or other activities to utilize the waste heat from facilities
- Opportunities for using public lands for location of facilities whenever as economically practicable as the use of private lands and compatible with the requirements of this section

## **Water Resource Impacts:**

- Hydrologic studies of adequacy of water supply and impact of facility on streamflow, lakes, and reservoirs
- Hydrologic studies of impact of facilities on groundwater
- Cooling system evaluation, including consideration of alternatives
- Inventory of effluents, including physical, chemical, biological, and radiological characteristics
- Hydrologic studies of effects of effluents on receiving waters, including mixing characteristics of receiving waters, changed evaporation due to temperature differentials, and effect of discharge on bottom sediments
- Relationship to water quality standards
- Effects of changes in quantity and quality on water use by others, including both withdrawal and in situ uses
- Relationship to projected uses
- Relationship to water rights
- Effects on plant and animal life, including algae, macroinvertebrates, and fish population
- Effects on unique or otherwise significant ecosystems, *e.g.*, wetlands
- Monitoring programs

## **Air Quality Impacts:**

- Meteorology -- wind direction and velocity, ambient temperature ranges precipitation values, inversion occurrence, other effects on dispersion
- Topography -- factors affecting dispersion
- Standards in effect and projected for emissions
- Design capacity to meet standards
- Emissions and controls:
  - Stack design
  - Particulates
  - Sulfur oxides
  - Oxides of nitrogen
  - Heavy metals, trace elements, radioactive materials, and other toxic substances
- Relationship to present and projected air quality in area
- Monitoring program

## **Solid Waste Impacts:**

- Solid waste inventory
- Disposal program
- Relationship of disposal practices to environmental quality criteria
- Capacity of disposal sites to accept projected waste loadings

## **Radiation Impacts:**

- Land use controls over development and population
- Wastes and associated disposal program for solid, liquid, radioactive, and gaseous wastes

Analyses and studies of the adequacy of engineering safeguards and  
operating procedures  
Monitoring -- adequacy of devices and sampling techniques

**Noise Impacts:**

Construction period levels  
Relationship of present and projected noise levels to existing and  
potential stricter noise standards  
Monitoring -- adequacy of devices and methods



8. that the department or board of health have indicated that the facility complies with health laws under the jurisdiction of the department; and
9. that the use of public lands was evaluated and selected whenever their use is as economically practical as the use of private lands and compatible with the environment.<sup>206</sup>

At present, there is limited coverage of pipelines under the Siting Act. If pipelines run to or from a large energy facility located in or out of Montana, the pipeline and its associated facilities must be constructed in accordance to a certificate issued by the board.<sup>207</sup> In general terms, those large facilities can be described as follows:

1. Electrical generating plants producing in excess of 50 megawatts and costing more than \$10 million to construct (including thermal, hydropower, and even alternative energy sources such as wind farms).

2. Coal gasification plants producing in excess of 25 million cubic feet per day and costing more than \$10 million.

3. Plants producing in excess of 25,000 barrels of liquid hydrocarbon products per day and costing more than \$10 million (e.g., synfuel and chemical plants, but not including crude oil and gas refineries which are exempt from the Act).

4. Uranium enrichment facilities costing more than \$10 million.

5. Any facility using more than 500,000 tons of coal per year and costing more than \$10 million.<sup>208</sup>

The statute excludes any natural gas pipeline or crude oil facility and strip mines regulated by the Montana strip mine statute. Natural gas pipelines to or from a large energy facility are exempt from the Siting Act.<sup>210</sup>

Montana, therefore, has the situation portrayed in Table 11. Pipelines containing gas (but not natural gas), water, or liquid hydrocarbons to and from any large energy facility within or without the state are covered by the Siting Act. Similar pipelines to smaller energy facilities are not. Pipelines containing other substances anywhere in the state are also exempt. Coal slurry pipelines using

TABLE 11:  
Present and Possible Future Coverage of  
Pipeline Construction Under Major Facility Siting Act

Type of Pipeline	Covered	Not Covered
<i><u>Under Present Law:</u></i>		
Gas, water, or liquid hydrocarbon to or from large <sup>a</sup> energy facility	X	
Gas, water, or liquid hydrocarbon to or from small <sup>b</sup> energy facility		X
Natural gas (anywhere)		X
Coal slurry:		
Water as medium	Prohibited use of water	
Other medium:		
To or from large energy facility (only if using liquid hydrocarbon)	X	
To or from small energy facility		X
Anywhere else		X
All other pipelines		X
<i><u>Upon removal of coal slurry ban:</u></i>		
Gas, water, or liquid hydrocarbon to or from large energy facility	X	
Gas, water, or liquid hydrocarbon to or from small energy facility		X
Natural gas (anywhere)		X
Coal slurry:		
To or from large energy facility (only if using water or liquid hydrocarbon)	X	
To or from small energy facility (any media)		X
Anywhere else (any media)		X
All other pipelines		X

Notes:

a "Large energy facility" is defined in accordance with MCA S 75-20-103(10)(a):

"Facility" means:

(a) except for crude oil and natural gas refineries, and facilities and associated facilities designed for or capable of producing, gathering, processing, transmitting, transporting, or distributing crude oil or natural gas, and those facilities subject to The Montana Strip and Underground Mine Reclamation Act, each plant, unit, or other facility and associated facilities designed for or capable of:

(i) generating 50 megawatts of electricity or more or any addition thereto (except pollution control facilities approved by the department of health and environmental sciences added to an existing plant) having an estimated cost in excess of \$10 million;

(ii) producing 25 million cubic feet or more of gas derived from coal per day or any addition thereto having an estimated cost in excess of \$10 million;

(iii) producing 25,000 barrels of liquid hydrocarbon products per day or more or any addition thereto having an estimated cost in excess of \$10 million;

(iv) enriching uranium minerals or additional addition thereto having an estimated cost in excess of \$10 million; or

(v) utilizing or converting 500,000 tons or coal per year or more or any addition thereto having an estimated cost in excess of \$10 million; . . . .

b "Small energy facility" means any other energy related facility not covered by MCA S 75-20-104(10)(a).

water are prohibited, but coal pipelines using other media are covered by the Siting Act if they run to a large energy facility.

In the event the Legislature simply removed the coal slurry ban and did nothing else, water-based coal pipelines would be subject to the Siting Act if they ran to or from large energy facilities. Anywhere else they would be exempt. Thus, so long as a company did not directly transport coal to a large energy facility, it could both build the pipeline and use large quantities of water without serious environmental scrutiny under the Act.

If the Legislature does desire to remove the coal slurry ban while providing a greater measure of environmental protection, several options are available. The Siting Act could be amended to apply to:

- o coal slurry pipelines running to small energy facilities;
- o coal slurry pipelines of certain cost, dimension or length;
- o all coal slurry pipelines;
- o all pipelines of certain cost, dimension or length; or
- o all pipelines

Bills introduced during the 48th Legislature proposed some of these possibilities. HB 894 would have placed pipelines costing in excess of \$10 million and capable of transporting coal slurry under the Major Facility Siting Act - whether or not they ran to energy facilities - but would have exempted such pipelines from meeting the criteria for public need.<sup>211</sup> HB 893 would have covered coal slurry pipelines of any value and would have retained the requirement of a certificate based on both environmental compatibility and public need.<sup>212</sup> Neither bill passed.

Coverage of certain large pipeline projects under the public need provision of the Siting Act would appear justified on the same basis that other large projects are under the Act: if the public is to invest in public works and services to support the construction and operation of such projects (as well as to mitigate their negative impacts), then the taxpayers should be afforded an independent review of the feasibility of the project.



The committee also feels that environmental compatibility is another reason for which to place pipelines not running to major energy facilities under the Siting Act. If proposed placement of coal slurry pipelines under the Siting Act is based on environmental concern for the water resource, it is probably best to regulate only water-based pipelines in excess of a certain capacity. If the desire is to control the rate of coal development, it is probably best to regulate all coal slurry pipelines (regardless of the medium) in excess of a certain capacity. If the concern is to minimize environmental damage along the construction route, perhaps all pipelines in excess of a certain length should be covered (capacity may not be as important as the disruption is similar whether a 6-inch or 36-inch pipeline is laid). Using the estimated construction cost of a pipeline as the jurisdictional factor for coverage under the Act is probably an inadequate proxy for criteria more tailored for the effects on the environment. The regulation of all pipelines appears unwarranted and administratively infeasible. Table 12 reviews these policy options.

b. Denial of eminent domain power

Conditioning or withdrawing the eminent domain power exercisable in the name of the state is another means to regulate, restrict, or virtually prohibit the construction of coal slurry pipelines within the state. Of course, water-based coal slurry pipelines are presently prohibited under the provisions of MCA § 85-2-104. Coal slurry pipeline companies using other transport medium, along with pipeline companies transporting crude petroleum or its by-products, have available to them the eminent domain power of the state when they seek to construct their lines across private or state lands. In the event the water-based coal slurry ban were removed, these pipeline companies as well would be eligible to exercise such eminent domain power. Of course Congress has been considering over the last years several legislative measures to provide coal slurry pipelines federal eminent domain power to expedite the construction of such lines.<sup>213</sup>

The justification given for allowing pipelines, other transmission lines, and, in their own time, railroads the right to exercise the

TABLE 12:  
Policy Options  
for Covering Pipelines Under  
Major Facility Siting Act

Concern	Policy	Comment
To determine environmental compatability:		
(1) Concern for environmental disruption along length of pipeline	Regulate all pipelines in excess of certain length and width	Extent of environmental disruption more directly related to length and width than to cost
(2) Concern for amount of water used	Regulate all water pipelines of certain width or rate of flow	Quantity of water most directly related to capacity of pipeline and not length
(3) Concern for quality of water used	Regulate all water pipelines or those in excess of certain volume, and require use of poor quality of water when feasible	Need to encourage search for alternative sources of water
(4) Concern for quality or disposal of water at pipeline terminus	Regulate all water pipelines or those in excess of certain volume, and require adequate plans for use or disposal of water	Need to encourage re-use or proper disposal of water
(5) Concern for rate of coal development	Regulate only coal pipelines (regardless of media), perhaps in excess of certain volume	Need only to target transportation modes that speed development of coal in order to ensure that development occurs in orderly fashion
To determine public need	Using formula based on cost, width, and length, place certain pipelines under MFSA	Potential public investment in infrastructure to support pipeline project is rationale for coverage

state's eminent domain power is based on the public importance of such projects. These transportation modes generally carry goods, commodities, and messages basic to the economic vitality of the country and its citizens. But (the argument goes), because of their linear length, they could not practically be built if their proponents had to negotiate for a right-of-way with all affected property owners (who would be under no obligation to sell). The state, therefore, steps in with the grant of eminent domain power to ensure that such publicly important projects are built and that private landowners, even if they can no longer refuse to sell, receive fair compensation for use of their land. In recent years, some critics have argued that certain linear projects can be completed without resort to the eminent domain power.

In Montana, the eminent domain power is available to "common carrier" pipelines which are defined as those firms (1) transporting crude petroleum, coal, or the products thereof by pipeline for public hire, or (2) transporting such products for their own benefit.<sup>214</sup> Those firms consenting to certain portions of the Public Utilities Code<sup>215</sup> are granted the right and power of eminent domain.

Actually, the eminent domain power in Montana is two powers. Section 69-13-103 of the Code gives a common carrier pipeline the right to parallel, cross, or go under any public stream or highway (so long as traffic is not interfered with and the roads and highways are promptly restored). Also, Section 69-13-104 gives common carrier pipelines the right to "enter upon and condemn the land, rights-of-way, easements, and property" of others necessary for the construction or maintenance of the pipeline. In exchange for these two powers, common carrier pipelines accept regulation by the Public Service Commission which includes the establishment of rates and operating rules.

As previously mentioned, upon removal of the coal slurry ban, coal slurry pipelines, using water would be eligible to exercise the eminent domain power (coal slurry pipelines using other substances are eligible now). If the Legislature does remove the ban, it would do so because (1) it wants to encourage the transport of coal by that mode, or (2) it is concerned about the constitutionality of the existing ban. If the



first reason is the motivation, little if anything needs to be done to the eminent domain law other than perhaps to ensure, through the ratemaking authority of the Public Service Commission, that coal slurry pipelines do not severely damage the railroads serving the state. Of course, environmental criteria could be built in as conditions to the exercise of eminent domain; but that review would be better performed by the Board of Natural Resources and Conservation through amendments to the Major Facility Siting Act than by the Public Service Commission.

If, however, the legislative motivation is to prevent coal slurry pipelines using water, denying the eminent domain power to those companies might be very effective. The state could deny all such firms the right to use or cross state lands, waters and highways; the right to enter upon or condemn private lands; or both. If the denial extends to coal slurry pipelines not using water, the policy is probably constitutional as it does not prevent the interstate movement of coal by other carriers and does not discriminate on the basis of a suspect classification or fundamental interest. The policy would be justified as the reasoned judgment of the Legislature to control the rate of coal development and/or to protect the economic health of railroads which are vitally important to the state's other citizens. Preventing access to state rights-of-way has particularly strong legal justification: the control of state highways is at the core of the state's police power.

If, however, the denial of eminent domain power extends only to water-based coal slurry pipelines, the constitutionality of the denial becomes suspect; and the police power rationale is to no avail. Article IX, section 3(3) of the Montana Constitution provides the power of eminent domain for public uses of water.<sup>216</sup> Coal slurry transport, as a beneficial use of water, would likely receive treatment as a public use.

There are two arguments supporting the premise that coal slurry, or coal slurry transport, is eligible for the eminent domain power guaranteed by Article IX, section 3(3). The first argument is that coal slurry is impure water and, because all waters in the natural environment are impure to some degree, is therefore within the board definition of water. This assertion is feasible because the law



regarding what qualifies as water is undefined in Montana and in the nation generally. Dictionary definitions also define water in various ways, ranging from a description of its chemical composition to "that flowing in a particular bed." An indication of this vagueness is a description used by the New Jersey Supreme Court in McCarter v. Hudson County Water Co.<sup>217</sup> where water was described as a "moveable, wandering thing." But the determination of how contaminated something must become before it is no longer considered water is apparently unresolved. One fact is known: surface and ground waters in their natural state, regardless of the degree of contamination, qualify as water.

One case involving copper leachate may be helpful in determining whether coal slurry could qualify as simply "dirty" water. In Utah Copper Co. v. Stephen Hayes Estate<sup>218</sup> the Utah Supreme Court evaluated whether water that had percolated through low grade copper ore was still water. This determination was needed because the contaminated water could only be obtained if the law regarding percolating waters could be applied. The plaintiff asserted that the copper solution was not water because it was artificially produced by the plaintiff's "industry and expense." The court saw no point in the assertion, since "[t]hey are still fluid, possessed of the same inherent characteristic that water has to wander hither and yon throughout the earth; ...", and thereby treated the fluid as "water .... or, at any rate, an unstable liquid the title to which can be held only in the way that one may hold title to water."<sup>219</sup> Thus, while the court did not commit itself totally to defining the solution as water, it gave it the same treatment as water.

A significant difference between the copper solution and coal slurry, however, may be the process by which the water becomes impure. If the contamination is by natural processes, such as leaching, the contaminated water could be evaluated as still being water. On the other hand, if the contamination is by artificial processes, such as the pulverizing of coal and subsequent mixing with water, the resultant substance might be evaluated as a unique product.

The second argument examines not whether coal slurry is a type of water but whether coal slurry is instead a transportation process

whereby coal is delivered to a market. This argument appears strong since, by analogy, the use of water for canal transportation clearly falls within the eminent domain powers provided by the Montana Constitution. Canal water is a transporting means, or medium. Similarly, water used for coal slurry is also a transporting medium. The pulverized coal is mixed with the water, transported as a slurry by pipeline to the point of destination, and then separated by a centrifugal process for use as an energy source. The water itself is not part of the final product. Thus, under this interpretation coal slurry is not a product that is different from water but instead is a term describing the way in which the coal is transported.

Further support for the premise that coal slurry pipelines have a constitutionally guaranteed power of eminent domain is given by the Montana Supreme Court's interpretation of eminent domain powers. In determining what qualifies as a "public use" under eminent domain proceedings, the court noted two views:

One view, the limited or narrow view, requires in general the actual use or right to use the proposed system as a whole.

The other view, called the broad view, essentially requires only a use conferring a "public advantage" or a "public benefit." Montana, as with other western states, has adhered to the broad view since 1895, presumably to promote greater economic development.<sup>220</sup>

This liberal interpretation thus would appear to sway the balance, if questions exist, toward awarding coal slurry pipeline companies constitutional eminent domain powers.

In summary, assuming coal slurry transport is probably entitled to the eminent domain powers associated with Article IX, section 3(3), a constitutional amendment would be required to remove the power.<sup>221</sup>

### 3. Securing Congressional reversal of *Sporhase*

The immediate problems facing Montana concerning its coal slurry ban and its previous water export ban are the direct results of the U.S. Supreme Court's decision in *Sporhase v. Nebraska*. Thus, one response the Legislature might make would be to support those efforts in the U.S.

Congress to legislatively override the offensive features of the decision. In Chapter 2 (supra at pp. II-3-5), we have discussed the possible avenues available to Congress if it desires to overrule the result of Sporhase. Over the last several years, two types of Congressional efforts have been attempted to secure such an override.

The first attempt has been to attach a "savings" clause to coal slurry legislation, such as S. 1844, "The Coal Distribution and Utilization Act of 1982," to enable state governments to apply their existing and future water laws, including the type of export bans or reciprocity requirements at issue in Sporhase, to restrict water for coal slurry pipelines without violating the commerce clause. Much controversy surrounded the merits and effectiveness of such proposals; and, in any case, none of the legislation passed the 98th Congress.

The second attempt has been to promote a more sweeping override of the Sporhase decision. In late spring 1984, for instance, Governor Toney Anaya of New Mexico was circulating a draft bill among his fellow Western Governors "to regulate the taking of water in one state for use in another state." Specifically, the draft bill contains a declaration by Congress that: "[T]here shall be no taking of water in one state for use in another except: (1) Pursuant to an interstate compact; (2) Pursuant to an equitable apportionment...decree; (3) Pursuant to an Act of Congress; or (4) By consent of a state exercising its sovereign power to allow the taking of water within its boundaries for use out of state."<sup>222</sup>

The draft bill was not formally introduced in the 98th Congress - in part out of concern about opening Western water law to Congressional action. It is unclear whether such a measure will be introduced in the 99th Congress.

Montana could undertake several efforts to support a Congressional override of the Sporhase result. At a minimum, a joint resolution of the Legislature could be passed urging Congress to approve legislation restoring to states the ability to restrict exporting of their water. A more effective response might be to fund a lobbying effort in



Washington, D.C. - hopefully in cooperation with other states - to secure a reversal of Sporhase.

#### 4. Evaluation of Level 2 response

For the purpose of this evaluation, it is assumed that the Legislature undertakes the following steps at the upcoming session: prevents the ban on the exportation of water from coming back into effect; strengthens the permit criteria in MCA 85-2-311, especially those pertaining to proposals to export water; allows water to be used for coal slurry pipelines but denies all coal pipelines the eminent domain power or, at least, places them under the Major Facility Siting Act.

Table 13 outlines the effects of these steps on the water policy criteria set forth in the beginning of this chapter. This strategy is effective in solving the constitutional difficulties with the anti-export and anti-coal slurry bans. The strategy is also effective in evaluating moderate and large appropriations of water (through water permit and, when applicable, Major Facility Siting proceedings) for the effects they might have on the state's interests.

Yet, the strategy, by removing the bans, potentially facilitates the interstate movement and sale of Montana's water to higher uses. Most of the revenues from the sales would flow to private appropriators and not to state government. Also, at the time greater movement of water is being facilitated, the strategy does not strengthen Montana's position in relation to other states. Thus, Montana's future interests to the water are jeopardized.

Of course, Montana might effectively forestall the interstate movement of water by denying coal slurry pipelines (probably the only short-term customer for the water) the power of eminent domain. The state still must be prepared for the day when other out-of-state demands develop for its water or the day when Congress gives coal slurry pipelines the federal power of eminent domain.

#### C. Level 3 Response: Develop a Water Marketing Program

"Water marketing" is the transfer of the use and/or title of water from a willing seller to a willing buyer for a consideration paid. To



TABLE 13:  
Evaluation of Level 2 Response:  
"Fine-Tuning" Existing Law

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How well does a Level 2 response . . .

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Protect existing consumptive uses?	<p>Moderate level of protection through completion of general stream adjudications on schedule now contemplated</p> <p>Probable increase in value of existing rights as they could now be sold and transferred out-of-state (under certain circumstances) for higher valued uses</p> <p>Moderate level of awareness of other consumptive rights being established in Basin which might compete with Montana uses in any equitable apportionment action</p>
Protect Montana's anticipated future consumptive uses?	<p>Because Montana's water could now flow regionally, more competitors for state's water -- especially competitors who can afford to pay more</p> <p>In this case, relying on DNRC and local governments to institute reservations at present speed does not aggressively secure water for Montana's future needs and limits future options</p> <p>Water development "as usual" provides low level of protection from claims of other states</p> <p>Continued reliance on fragmented water data system seriously delays state responses to changed circumstances and seriously retards development of Basin strategy</p>
Protect instream values, water quality, and the public trust interest in the waters?	<p>Slow water development results in high instream flows, at least over the short-term</p> <p>In view of growing regional interest in Montana's water and greater freedom to transfer it out-of-state for consumptive purposes, relying on DNRC and local governments to institute reservations at present rate provides low level of permanent protection for instream values</p>

Maximize for Montana's benefit the economic value of the waters?

Protect and enhance intergovernmental, interstate, and state/tribal relations?

Lend itself to administrative feasibility?

Retaining or strengthening existing public interest criteria in MCA § 85-2-311 affords high level of scrutiny of all permit applications -- even those for use of water out-of-state

Effects of coal slurry, even though allowed, are limited by MFSA coverage and strengthened public interest criteria

Certainty of existing water rights must await normal completion of general stream adjudications and negotiation of federal and Indian reserved rights

State water marketing limited to Fort Peck Reservoir and state facilities

To extent state does not actively market water under existing authority, other potential sellers (federal government, Indian tribes, and private firms) have legal, regional access to whatever market exists; whatever revenues produced go to those sellers (in essence, state has provided sellers with wholesale commodity for free)

State obtains economic value from construction of coal slurry pipelines and related works (*e.g.*, jobs, taxes, multiplier effects)

As exportation of Montana's water occurs with more frequency, overt conflicts with other states, tribes, federal government, and private parties in other states increase over short-term; underlying tension and conflict resulting from uncertainty as to rights grows and festers

More difficult to administer as DNRC must apply both strengthened public interest criteria; DNRC, its Board, and other agencies must apply MFSA; and Public Service Commission gains jurisdiction, for eminent domain purposes, over coal slurry pipelines

Effectiveness of state water managers seriously limited by fragmented data and uncertainties as to federal, Indian, and private water rights -- all of which is critically important as water begins to move regionally

TABLE 14:  
Present Possibilities for Water Sales

INTERESTED PARTY	WHO SELLS?	CONSIDER- ATION PAID WHOM?	STATE JURIS- DICTION?
Approaches <u>federal</u> government for <u>industrial</u> water from			
Fort Peck <sup>a</sup>	Option to state	Equally to state & federal gov. if sold by state	Whether state sells or not
Yellowtail, Tiber, Canyon Ferry <sup>b</sup>	Same	Same	Same
Other Reservoirs (Hungry Horse, (Clark Canyon, Gibson)	Federal government	To federal government	Probable <sup>c</sup>
Approaches <u>federal</u> government for water for <u>other</u> purposes	Federal government	To federal government	Probable <sup>c</sup>
Approaches <u>state</u> for water from <u>state</u> reservoirs (for <u>any beneficial</u> use)	State government	To state	Yes
Approaches <u>private</u> party for water for <u>any beneficial</u> use	Private party	To private party	Change of use review <sup>d</sup>
Appropriates water in <u>own</u> name for <u>any beneficial</u> use; perhaps later transfer of use (including to an out-of-state location)	No sale; simply application for permit	None paid	Public interest criteria <sup>e</sup> ; per- haps change of use <sup>f</sup> or MFSA <sup>g</sup>
Indian tribe	Tribe	Tribe	Probable juris- diction over off reservation movement or use of water (if otherwise lawful)

<sup>a</sup> Under Memorandum of Agreement dated 1976.

<sup>b</sup> Under Proposed Memorandum of Agreement drafted in 1984.

<sup>c</sup> So long as State conditions do not defeat primary purpose of federal project. *United States v. California (New Mellones Dam)*, 694 F.2d 1171 (9th Cir. 1982).

<sup>d</sup> MCA S 85-2-402 (1983).

<sup>e</sup> MCA S 85-2-311 (1983).

<sup>f</sup> MCA S 85-2-402 (1983).

<sup>g</sup> MCA S 75-1-101 *et seq.* (1983).

measures introduced in the 1983 session of the Legislature. As with each of the preceding levels of policy response, the marketing alternative will be evaluated according to the criteria set forth in the introduction to this chapter.

1. Present status of water marketing

The present status of water marketing in Montana is displayed in Table 14. Of concern to the people and policymakers of Montana is who can market, whether the state receives any of the payments, and whether the movement and use of purchased water falls under any of the environmental regulations of the state.

The federal government, with its large mainstem reservoirs, is the most obvious seller of water. It is free to do so, although recent litigation<sup>223</sup> raises the issue of whether the Corps of Engineers or the Bureau of Reclamation is the appropriate selling agency. Proceeds from such sales are not shared with the state, but the revenues do benefit the state as they are deposited into the Reclamation Fund to finance other water development projects. Those revenues, however, need not be spent in the state where they were earned.

Because irrigated agriculture has not developed in the upper basin to the extent anticipated (due, in large part, to Congress' reluctance to finance promised projects), the Bureau of Reclamation considers there to be surplus water in the upper basin. This surplus has been allocated among the basin states giving those states the permission to market the water for industrial purposes. Pursuant to an agreement executed in 1976, the State of Montana received permission to market 300,000 ac-ft/yr from Fort Peck Reservoir. The DNRC is currently negotiating with the bureau for a similar agreement, affecting Yellowtail, Tiber, and Canyon Ferry reservoirs. If the state makes a sale (which it has done only once), the proceeds are split equally with the federal government under both the existing and proposed agreements. Still, interested buyers can directly approach the federal government for non-industrial water from these four reservoirs or for water for any purpose from other federal reservoirs. Those sales revenues would not be shared with the state.



The state, of course, can sell water for any beneficial use under existing authority given to the DNRC.<sup>224</sup> If the coal slurry ban is removed, the state could sell water for that purpose without any additional legislative authority. The existing law, however, is silent on many important considerations including where sales revenues go.

Present and future appropriators are also free to sell water. Water rights are commonly capitalized in the sales price of farm and ranch properties, and the rights are transferred to the new property owner as a part of the deed. Water rights may also be severed and transferred separate from the land, but the seller must receive the prior approval of DNRC, which "shall approve the proposed change if it determines that the proposed change will not adversely affect the water rights of other persons."<sup>225</sup> In both these incidences, consideration for the sale is paid only to the selling appropriator.

Thus, under existing law, water can be appropriated solely for resale for beneficial uses - either in or out-of-state. Also, there seems to be nothing to prevent a firm from engaging in the business of selling water rights so long as beneficial uses can be identified and the permit criteria of MCA § 85-2-311 satisfied. (There is a statutory ban against speculation "on large quantities of groundwater,"<sup>226</sup> there is no indication as to what constitutes speculation). In essence, the seller could obtain his raw materials for free. The hypothetical is not far removed from fact. One appropriator holding a pre-1973 use right to 80,000 ac-ft of water is potentially in the business of selling water. A Wyoming community has applied for a groundwater permit for water to be pumped out of Montana and presumably sold for domestic use.

Finally, although controversy exists over this issue, there is the possibility that the Indian tribes of the state could sell or lease their reserved water rights. The fact is that such leases are taking place throughout the West although some argue that, because the rights are calculated on the basis of "practicable irrigable acreage" on the reservation, the water must be used for on-reservation farm purposes. Of course, none of the revenues would flow to the state.

Table 14 also indicates the situations in which the state would have some regulatory jurisdiction (e.g., Montana Environmental Policy Act, Major Facility Siting Act, water permit criteria) over the appropriation of water leased or sold by federal, Indian (arguably), or private sellers.

From this review, the committee concludes that the potential for water marketing, even under existing law, is theoretically great (for considerations of whether there actually is a market for the waters, see Chapter 2 at pp. II-8-11). Also, the existing situation allowing water marketing, although complex, is reasonably equitable. Because the federal government has financed large water development projects, it is entitled to money from the sale of water captured by virtue of those projects. The state, however, should share in those proceeds because it gave up valuable bottomland for the construction of those reservoirs and the promised irrigable lands have not been brought into production. Similarly, both private appropriators, who have put water to use through their investment and labor, and Indian tribes, who depend on their water rights as an integral part of their economic future, should be entitled to sell their water and benefit from the sales proceeds - so long as the movement and use of the water is environmentally responsible.

The committee, however, has three major concerns stemming from the present situation. The first concern relates to the ability of a purchaser to obtain non-industrial water (perhaps water for a large, thirsty metropolis) directly from the federal government, without payment of the state, because of the inapplicability of the Fort Peck memorandum of agreement. The committee believes the state should renegotiate the present agreement with the Bureau of Reclamation to extend it to sales from all federal projects within the state and to all types of water. At the same time, the committee believes that the applicability of Montana's environmental regulations to the movement and use of the purchased water be specifically stated in the agreement.

The committee's other two concerns about the present situation pertain to the unappropriated waters of the state. One concern is the danger of a firm appropriating a very large quantity of water for

consumptive use in a large project (especially a project out-of-state) without paying anything for the water. Of course, in many instances, the firm might seek to purchase water directly from the state to avoid the greater expense of building its own storage facility. But, in cases where that was not true, the state should require payment. To meet this concern, the state could consider either (1) a sizable permit fee when the volume of new water appropriated exceeds a certain amount (e.g., 4000 ac-ft/yr), or (2) a "stand-by" marketing program for large appropriations, an option discussed in subsection three.

The third concern is the wisdom of allowing large-scale speculation in the resource which could come about as a result of water marketing firms buying up existing rights for resale, firms appropriating water presently unappropriated for resale, or both. Should firms be allowed to be in the exclusive business of selling water? If not, the state could impose an absolute ban against brokering or engaging in the business of water sales for profit. If such firms are allowed, perhaps a fee should be imposed on any new water that they appropriate. Perhaps the state should be a more active participant, even monopolizer of the market, an option also discussed below.

## 2. Economic considerations

Water can be allocated through the market, by government, or a combination of both. One commentator who spoke before the committee argues that a free market for water allocation had developed in the West only to be transformed into an allocation system regulated by government:

From the Western mining camps and cattle ranches came absolute property, equal footing for uses, and transferable ownership rights. As a result, markets were left to determine the value of water....[A] system of water law evolved which (1) granted to the first appropriator an exclusive right to the water and granted water rights to later appropriators on the condition that prior rights were met; (2) permitted the diversion of water from the streams so it could be used on nonriparian land; and (3) allowed for the transfer and exchange of water rights between individuals.<sup>227</sup>



This author argues that these two components, security of right and free transferability, were the necessary and desirable ingredients for efficient water allocation through the market. Over the years, however, four trends worked together to bring about a much greater and centralized role for the government in the allocation of water: (1) a concern that water was so unique as to require government allocation; (2) a fear that private appropriators would monopolize the resource; (3) a concern that only government, and not private markets, could provide the capital necessary for the construction of large projects; and (4) the fear that the market would not prevent damaging externalities (e.g., pollution) resulting from market allocation of the water.

This author and others have suggested the need to inject characteristics of the market place back into water allocation decisionmaking. There are several advantages of market allocation. First, markets provide decentralized decisionmaking where people and firms are able to more accurately specify the amount of water they desire and its value to them. Second, market allocation is responsive to changing needs and preferences and provides for rapid accommodation of new water users. Third, in market situations, water tends to move to uses in which it has the highest economic value and thus encourages conservation. In our region, the value of irrigation water has been reported as ranging between \$4.97 and \$81.20 per ac-ft while other uses range as high as \$368.63 per ac-ft (see Table 15). Water will then tend to move away from agricultural and toward municipal and industrial uses.

Yet, as to this last concern, one set of commentators has noted that "use of the marketplace is unlikely to require, on a regional basis, abandonment of enormous amounts of irrigated acreage. Water supplies of cities, energy companies, and other new uses are relatively small in comparison with water use in irrigated agriculture."<sup>228</sup> Montana economists seem to concur:

The effective demand...for Montana water is likely less than that popularly believed. The willingness-to-pay for raw water (F.O.B. Montana and unprocessed) is decidedly lower than that reflected in



TABLE 15:  
Range of Water Values by Major Use

USE	RANGE of VALUES <sup>a</sup> (\$/ac-ft)
Irrigation	\$4.97 - 81.20
Municipal	261.80 - 368.63
Industrial	0.03 - 352.15
Recreational	-- <sup>b</sup>

Notes: <sup>a</sup>All values in 1980 dollars.

<sup>b</sup>Not reported.

Source: Beattie B.R., M.D. Frank, C.R. Taylor. November, 1984. Economics of Water Marketing Options for Montana. Department of Agricultural Economics and Economics, Montana State University.

demand studies based on value in use at point of use. Relatively inexpensive water is generally more readily available for high-valued uses in distant locations from Montana that popularly believed. For example, agricultural water values are quite low throughout the western United States and most higher-valued demands can be satisfied by diverting rather small amounts of water from agriculture to higher-valued uses in those states. Thus, it is the present lower-valued uses out-of-state that more realistically represent the possible effective demand for Montana water.<sup>229</sup>

Commonly cited disadvantages of market allocation of water include the fear that water rights may be consolidated by a few entities, that there may be unequal access to the market, and that markets do not fully recognize the "community" importance of water.<sup>230</sup> That is, water is different from other commodities in that it is such a prominent feature of the natural landscape and, in certain uses, nothing adequately substitutes for it.

The committee believes that Montana is best described as a "mixed" economy when it comes to the allocation of water. Both the market and government presently have a proper role in the allocation of the resource. As has been seen, there is presently ample opportunity for water sales to take place in the state - especially if the anti-export ban is not revived. The federal government, Indian tribes, private holders, and the state itself are all potential sellers. There is also an important role for government in applying appropriate public interest criteria to permit applications to ensure that the natural and community values of water are protected. Possible modifications to strengthen the public interest criteria were discussed in the previous section. These modifications, or even appropriate use of the existing criteria, should go a long way in reducing the concern for the effects of great amounts of water moving beyond Montana's borders.

The concern left outstanding, however, is to prevent large appropriators from profiting from a resource they can presently obtain, in many cases, for free. Three policy options are considered in the next section and discussed in view of how they handle this issue: (1)

the marketing proposals considered at the last legislative session; (2) a "stand-by" marketing scheme; and (3) state appropriation and marketing of all unappropriated water.

### 3. Possible marketing schemes and desirable elements

This subsection discusses the marketing proposals introduced at the last session and other possible approaches that should be considered as well. While the following discussion of the possibilities does not attempt to cover all the considerations any marketing proposal must ultimately address, it may be helpful to keep in mind the following questions for any such proposal:

1. Who manages the program for the state (DNRC, DNRC Board, state-created corporation, trust)?
2. Do sales have to be approved by the Legislature?
3. How much should be sold or leased annually? If lease, for how long?
4. How should fair market value be calculated? Should there be any uses that are subsidized?
5. Where should diversions take place (on stream, state reservoirs, federal reservoirs)?
6. Should the state build, own, and operate all delivery facilities (e.g., California model)?
7. Should there be an automatic "set-aside" of a certain amount of water for private or other public uses (see legislation from last session, infra)?
8. How are the environmental interests of the state protected (EIS coverage, MFSA coverage, application of public interest criteria)?
9. Can the purchaser's or lessor's interest be transferred or subsequently resold?
10. How are the proceeds from sales to be distributed?
11. What are the conditions and remedies available on contract default?

Space does not permit a detailed discussion of these considerations with respect to each of the following proposals. They must be addressed, however, in any actual marketing program the Legislature might design.

a. Proposals at the last session

Three bills relating to water marketing were introduced and considered by the 1983 legislative session: HB 893 introduced by Rep. Neuman and others (the Schwinden administration bill); HB 894 introduced by Rep. Marks and others; and HB 908 introduced by Rep. Harper and others. Only HB 908 survived the session to be passed into law. It was the ultimate vehicle for the rescission of the anti-export ban, authority to market water from other federal reservoirs, the improved permit criteria - all on a temporary two-year basis - and the empaneling the Select Committee on Water Marketing. A description of the major features in each bill as originally introduced follows. More detailed comparison of the bills is set forth in Table 16.

(1) HB 893

The Neuman bill proposed repeal of the ban on exportation of water but continuation until 1987 of the coal slurry ban unless the water was purchased under the marketing provisions of the bill. The permit criteria for diversions in excess of 3000 ac-ft/yr and 15 cfs were to strengthen the law along the lines suggested by the Supreme Court in its Sporhase decision. The bill would have placed all water and liquid hydrocarbon pipelines (except natural gas) under the Major Facility Siting Act.

The bill would have set up a water program of up to 50,000 ac-ft/yr for industrial purposes with terms not exceeding 40 years. Sales proceeds would be invested in water marketing storage facilities, water development, and soil and water conservation. Any project using water purchased from the state would be required to set aside 25 percent of its capacity for the use of other persons upon their payment of the connection costs.

The bill proposed a legislative water oversight committee.



TABLE 16:  
Comparison of  
Water Marketing Proposals  
Considered by 1983 Legislature  
(As Bills Were Originally Introduced)

HB 893

HB 894

HB 908

MODIFICATIONS TO EXISTING WATER CODE

**MCA S 85-1-101:**

Marketing of water is consistent with state policy	Environmentally sound marketing of impounded water is reasonable use	NA
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**MCA S 85-1-102:**

Defines "energy industry use," "energy industry user," "energy minerals," and "storage facility"	Defines "energy industry use," "energy minerals," "impounded water," and "impoundment"	NA
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**MCA S 85-1-121  
(anti-export ban):**

Amends section to remove anti-export ban but adds criteria for DNRC Board to use in approving export petition	Amends section to remove anti-export ban but requires DNRC to ensure that MCA S 85-2-311 criteria are met	Entire section repealed
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**MCA S 85-1-202:**

Board approval necessary before DNRC can acquire permit to acquire water for marketing	Same	NA
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**MCA S 85-1-204:**

Authorizes DNRC to acquire water rights for marketing	Generally same	NA
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**HB 893****HB 894****HB 908****MCA S 85-1-205:**

Authorizes DNRC to acquire water rights from any federal reservoir and not just Fort Peck

Same

Same

**MCA S 85-1-604:**

NA

Authorizes deposit of sales proceeds into water development account earmarked for loans and grants

NA

**MCA S 85-2-102:**

NA

Defines "low quality water"

NA

**MCA S 85-2-104  
(coal slurry ban):**

Continues ban on coal slurry pipelines until July 1, 1987, unless qualified to purchase water as "energy industry user" under marketing provisions of bill

Repeals coal slurry ban

Leaves coal slurry ban in place

**MCA S 85-2-241:**

NA

Authorizes deposit of sales proceeds into water rights adjudication account

NA

**MCA S 85-2-311:**

Adds to permit criteria affecting 3000 ac-ft/yr and 15 cfs the state policy objectives set forth at MCA S 85-1-101

Adds to permit criteria for all applicants content of MCA S 85-1-101; state water plan; and health, welfare, and safety of citizens

Adds detailed public interest criteria to applications for permits in excess of 5000 ac-ft/yr or 7 cfs

**HB 893**

Applicant for 10,000 ac-ft/yr and 15 cfs must prove "by clear and convincing evidence" that rights of others will not be affected

Permits for use of water outside state limited to 40 yrs with renewal according to MCA S 85-1-101 criteria, regardless of amount

**HB 894**

Limits water marketing permits to 45 yrs

Requires consideration of low quality water for energy industry use

**HB 908**

Such a permit cannot be issued unless approved by the Legislature

**MODIFICATIONS TO MAJOR FACILITY SITING ACT****MCA S 75-20-104:**

Places gas (except natural gas), liquid hydrocarbon, and water pipelines under MFSA (whether or not they run to or from major energy facilities)

Places coal slurry pipelines (regardless of medium) under MFSA if their estimated cost exceeds \$10 million

Places all pipelines capable of transporting water or using water as medium under MFSA if they exceed 20 inches in diameter or 30 miles in length

**MCA S 75-20-301:**

NA (thereby retaining both environmental and public need review)

Removes consideration of public need and convenience by DNRC Board when it certifies coal slurry pipeline in conformance with environmental and procedural requirements of act

NA (thereby retaining both environmental and public need review)

**MCA S 75-20-303:**

NA

Requires that coal slurry pipelines less than 30 miles be completed within 5 yrs of certificate; for lines more than 30 miles, within 10 yrs

Same

NEW PROVISIONS CONCERNING WATER MARKETING

DNRC can acquire 50,000 ac-ft of water for sale, lease, or transfer for industrial purposes

DNRC can market impounded water or sell permits to do so; no more than 50,000 ac-ft/yr for ~~energy~~ industrial use [unlimited for other industrial use?]

DNRC can acquire water marketing rights not to exceed 40 yrs which may be renewed

Generally same

DNRC can sell or transfer rights not to exceed 40 yrs which may be renewed

Not to exceed 45 yrs

DNRC must perform EIS

Same

Water must be in excess of existing and foreseeable uses

Contract of conveyance must set aside 25% of project capacity for use of other persons on their payment of costs of tying into project and removing water

If feasible, 25% set aside for such other users

Proceeds committed to construction and rehabilitation of water marketing storage facilities; specifically, creates water marketing account appropriated by biennial Legislature; thereafter, any funds remaining split 50% for water development, 25% for soil and water conservation, 25% to general fund

Proceeds split with 75% going to assist water adjudications and to water development; other 25% to general fund



HB 893

Creates water resources oversight committee with 4 members from each house

HB 894

Same

HB 908

Creates interim Select Committee, 4 members from each house, to study water marketing

(2) HB 894

The Marks bill proposed repeal of the anti-export ban and the coal slurry ban. The bill would have strengthened the permit criteria for all applicants by requiring consideration of the state's water policy as stated in MCA § 85-1-101; the state's water plan; the health, welfare, and safety of the state's citizens; and whether low quality water could be used for emergency uses. Coal slurry pipelines, whether using water or some other medium, would be covered by the Siting Act if their estimated cost exceeded \$10 million; but the review under the Act would be limited to environmental and not public need consideration.

Unlike the Neuman bill, the marketing program would be unlimited sales, but water "energy industrial purposes" (e.g., coal slurry purposes, thermal cooling) would be limited to 50,000 ac-ft/yr. Sales proceeds would split among water development, water adjudication, and the general fund. Also a 25 percent set-aside for other uses would be required if feasible.

This bill also proposed a legislative oversight committee.

(3) HB 908

The Harper bill, HB 908, was not a marketing bill as such. While it would have removed the anti-export ban, the coal slurry ban would have remained in place. Very detailed public interest criteria were proposed - most of which ended up in the passed version.

The bill would have placed all pipelines capable of transporting water (or with water as a medium) under the Siting Act if they exceeded 20 inches in diameter or 30 miles in length.

The Select Committee on Water Marketing was empaneled as a result of the passage of this bill.

b. "Stand-by" marketing program

The proposals considered at the last session, if they had been adopted, would have resulted in a stand-by water marketing program of sorts. That is, so long as any customer desired to deal with the state, the DNRC would be empowered to obtain a permit for water impounded at a state or federal reservoir and to sell the right to the customer. At present, however, DNRC has authority that can also be described as

stand-by sales authority<sup>231</sup> although many of the desirable features of such marketing are left unstated.

Neither the present law or last session's proposals, however, prevent an interested party from appropriating water in its own name without payment to the state. The "stand-by" marketing program proposed here is one that would kick in automatically whenever a party desired to buy or appropriate a large quantity of water - say in excess of 4000 ac-ft/yr.

The stand-by program could work one of several ways. The first possibility would be to prohibit anyone but the state from appropriating new water in excess of (say) 4000 ac-ft/yr. If a party desired water in excess of that amount, they would purchase or lease the right from the state or from an existing appropriator. The state might also be able to eliminate its competition by banning private sales in excess of the limit. Existing permit holders would still be free to sell less than the limit. This approach is essentially the recommendation of the committee as set forth in Chapter 6 and the proposed bill, Appendix D.) Such a ban, however, might encourage subterfuge as buyers and private sellers craft novel ways to avoid the ban.

The second possibility would be to prohibit anyone but the state from appropriating or holding a permit in excess of (say) 4000 ac-ft/yr. Thus, a party seeking a permit for that quantity of water in the first instance would have to purchase or lease from the state. Also, existing appropriators having less than 4000 ac-ft/yr would have to purchase or lease from the state any quantity of water that exceeded the limit. Parties currently holding permits in excess of the maximum would be "grandfathered in" or exempted from the impending legislation. The value of existing private rights, however, would be diminished by removing one class of potential customers from the private market. Private holders would still be able to sell their rights to others not in danger of exceeding the limit.

The third possibility would be to build a progressive rate schedule into either of the other two. Thus, the cost for the first 1000 ac-ft (in excess of the threshold 4000 ac-ft/yr) would be "\$X". The cost for

the second 1000 ac-ft/yr would be "\$ 1.1(X)" or some other additional increment.

The advantage of these "stand-by" options would be several. The first version would ensure that new water users in the state pay adequate consideration when they seek, on a one-time basis, to acquire a large volume of water. It would not, however, prevent a user from obtaining numerous permits over a period of time that, in total, exceeded the maximum. The second version would extend this advantage by ensuring that any water user - not just large new ones - pays adequate consideration for the use of water exceeding the limit. The third option, by applying a disincentive to increasingly larger uses, allows refinement in how large the penalty cost will be.

These proposals, however, may almost invite circumvention as parties seek clever means to avoid the limitation. Because they empower the state with monopoly power in certain instances, they depress the value of existing private rights. The proposals would require continuous monitoring by DNRC and the administration and enforcement costs are difficult to calculate. Presumably these costs would be paid out of sales proceeds; but it is conceivable that, based on past experience, the state would have no sales over the next few years while the monitoring would have to continue.

c. State appropriation and marketing of unappropriated water

The "stand-by" marketing proposals would kick in only when a customer desired to deal with the state (the case under current law or the proposals of the last session) or when the quantity of water exceeded a certain threshold (the proposals outlined in the last subsection). The concept outlined in this subsection could make the state a more active market participant - with some important benefits if the state desires to exercise as much control over the export of water from the state. This proposal, also discussed as an alternate reservation of water process in the next section ("Level 4"), is for the state to appropriate in its own name all unappropriated ground and/or surface water. Therefore, the state acts as a proprietor of the water - selling or leasing not choosing to sell or lease to whomever it wished.



Urban dwellers will recognize the proposal as analogous to city-owned and operated municipal water systems. For those not having their own supply, the only source of water is the city. The important difference is that, while a city would presumably have to sell to any resident desiring water able to afford the service, a line of U.S. Supreme Court cases seems to give states much more leeway in the sale or disposal of the state's resources. In acting as a proprietor and not as a regulator of state resources, the state, as a "market participant," has much more discretion to select purchasers and specify terms on bases that might otherwise run afoul of the interstate commerce clause. (This "market participant" concept is in the committee's recommendations set forth in Chapter 6 and in the proposed bill, Appendix D.)

The "market participant" concept has received growing attention in the last several years - in large part due to the work of a study committee set up by the 1983 New Mexico Legislature. It may be recalled that New Mexico has been involved in ongoing litigation with El Paso concerning the exportation of groundwater from southern New Mexico for municipal uses across the state border. The litigation resulted in the federal district court declaring New Mexico's ban on the exportation of water to be unconstitutional. The Legislature amended the statute, and the amendment has been found by the same court to be constitutional. In addition to revising the statute, the Legislature created a Water Law Study Committee "to study, examine and evaluate"<sup>232</sup> the court decision. The committee concluded that, if the state desired to maintain its water resources (groundwater in this instance), it would have to establish control by asserting a proprietary interest in those resources. The committee suggested that one means to do so (pending further study) would be for the state to appropriate in its own name all unappropriated groundwater.<sup>233</sup> As to this water, the state would become a proprietor - not a regulator. The distinction is critical: under a line of cases decided by the U.S. Supreme Court, the Court has allowed states, when they act as "market participants," to discriminate in the purchase and sale of goods in a fashion that would otherwise violate the dormant interstate commerce clause. Thus, in Revees, Inc. v. Stake<sup>234</sup> the Court

upheld a South Dakota statute that authorized a state-owned cement plant to sell only to state residents. As recently as this past spring, the Court, while striking down an Alaskan statute requiring in-state first processing of state-owned timber, seemed to indicate that Alaska could choose the purchasers with whom it would deal so long as it did not attempt to restrict the post-purchase behavior of the buyers (South Central Timber Development, Inc. v. Wunicke<sup>235</sup>).

By comparison, if a state like New Mexico or Montana were to appropriate all (or a portion of) unappropriated ground and/or surface water and then act as a proprietor of the resource, it would presumably to sell water to whom it chooses - including preferring Montana residents to all others. What the state could not do would be to attempt to restrict further sales or leases of the water rights on a basis that would violate the interstate commerce clause.

Thus, the proposal could be for the State of Montana to appropriate all or a certain quantity of ground and/or surface water. The right could be held by DNRC, a state-created corporation, or a state-created trust. Either in the implementing legislation or in policies developed by the DNRC, corporation, or trust, decisions would be made about the amount of water to be sold or leased annually, the proportion of water to be sold in and outside Montana, the means to calculate fair market value (and whether a differential price system, depending on water use, should be incorporated into the program), the method of sale (e.g., "over-the-counter" or auction), terms of payment, and other conditions of the transaction. The implementing legislation, of course, would specify the distribution of the sales proceeds. Preferred uses would probably be for future water development, completion of stream adjudications, funding of water resource data collection, or long-term investment in a "heritage" fund with income being invested back into water resource management.

In the next section describing a "Level 4" response, the advantages of a state-appropriation and marketing proposal in the context of water reservations are discussed. For now, it is only important to note that the administering department, trust, or board could decide to hold off

the market water sufficient to serve instream values and predicted future consumptive uses.

#### 4. Evaluation

The development of a water marketing program is not a necessary response of the Legislature as we already have such a program under law existing even before the 1983 session.

Yet, even with the limited amount of interest in Montana's surplus waters to date, the Sporhase decision, growing regional scarcity, and the revitalization of the Western energy market may eventually result in a regional or sub-regional water market. Perhaps a "stand-by" marketing program, which would apply to large appropriators wanting water in stored and unappropriated waters of the state, represents the best preparation we can make for that eventuality. Such a stand-by proposal, aside from guaranteeing revenues from large appropriators, does little to improve Montana's position in the basin.

The state appropriation/marketing proposal (through restrictions on initial sales) seems to promise a means for the state to control more closely the amount of water diverted from the state. The proposal provides maximum flexibility for the state in designing its water future. The idea, however, may be too bold a proposal for consideration during one legislative session and may warrant more intensive study. Table 17 sets forth an overall evaluation of water marketing.

#### D. Level 4 Response: Development of State Strategies to Maximize Montana's Fair Share of Missouri River Basin Water

To this point, our discussion of potential strategies has concentrated on relatively specific problems: whether water export can be prevented or conditioned, whether coal slurry uses of water should be allowed, and whether Montana's water should be sold. While the interstate movement of water has been the undercurrent of this preceding discussion, this section looks at the interstate movement of water from a different perspective. This section proceeds from the assumption that artificial, human-constructed diversions and exports of water out of the state are not the real threat to the state's water future (after all, ETSI involved only 50,000 ac-ft/yr and DNRC originally proposed a water

TABLE 17:  
Evaluation of Level 3 Response:  
Water Marketing Program

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How well does a Level 3 response . . .

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Protect existing uses?

Moderate level of protection through completion of general stream adjudications on schedule now contemplated; dedication of water marketing revenues to completion of adjudications would increase protection

Value of existing rights would tend to increase as result of free transferability but decrease as result of state competition

Moderate level of awareness of other consumptive rights being established in Basin which might compete with Montana uses in any equitable apportionment action

Protect Montana's anticipated future consumptive uses?

Because Montana's water could now flow regionally, more competitors for state's water -- especially competitors who can afford to pay

"Stand-by" or partial marketing programs do not, in themselves, speed reservation process; thus, relying on DNRC and local governments to institute reservations at present speed does not aggressively secure water for Montana's future needs and thereby limits future options

Use of "state appropriation/marketing" approach probably provides maximum amount of future protection -- so long as planning and water development follow

Use of marketing revenues to speed water development provides moderate to high level of protection from claims of other states

Continued reliance on fragmented water data system even more seriously delays state responses to changed circumstances, including market trends, and seriously retards development of Basin strategy

Protect instream values, water quality, and the public trust interest in the waters?

Increased water development results in reduction of instream flows over long-term



In view of growing regional interest in Montana's water, greater freedom to transfer it out-of-state, and marketing efforts of state, relying on DNRC and local governments to institute reservations at present rate provides low-level of permanent protection for instream values

Retaining or strengthening existing public interest criteria in MCA § 85-2-311 affords high level of scrutiny of all permit applications -- even those for use or sale of water out-of-state

Effects of coal slurry, if allowed, are limited by MFSA coverage, if made a part of marketing program, and strengthened public interest criteria

Maximize for Montana's benefit the economic value of the waters?

Certainty of existing water rights must await completion of general stream adjudications and negotiation of federal and Indian reserved rights; the adjudications could be accelerated by pledging marketing revenues to stream adjudication program; negotiations might be encouraged by producing interest and revenues in joint federal/state or Indian/state projects

State water marketing extended to all federal reservoirs and state facilities; greater opportunity for private marketing as well (except as to unappropriated water under "state appropriation/marketing" version)

State ensures fair consideration is paid to state for large uses of water

Using market to allocate water tends to encourage greatest efficiency and highest value in use

State obtains economic value from construction of coal slurry, related works, as well as other industries dependent on water (e.g., jobs, taxes, multiplier effect)

Protect and enhance intergovernmental, interstate, and state/tribal relations?

As exportation of Montana's water occurs with more frequency, and is even encouraged through marketing, overt conflicts with other states, tribes, federal government and private parties in other states increases over both short- and long-term; underlying tension and conflict resulting as to uncertainty as to regional rights grows and may become openly manifested

	Availability of marketing revenues for joint federal/state and Indian/state water projects might allow negotiation of outstanding reserved rights claims
Lend itself to administrative feasibility?	In addition to administration of strengthened or retained public interest criteria, setting up and managing water marketing program much more difficult -- especially if "state appropriation/marketing" program set up
	Effectiveness of State water managers is seriously limited by fragmented data and uncertainties as to federal, Indian, private rights and regional market sales and trends -- all of which is extremely critical as water begins to be sold and move regionally
Lend itself to political feasibility?	In addition to necessary discussions concerning public interest criteria, MFSA coverage, and other related issues, water marketing is controversial issue; "state appropriation/marketing" proposal expected to be very controversial

**Note:** Bold type distinguishes changes in evaluation from Level 2 response.

marketing program of 200,000 ac-ft/yr). Rather, the real challenge to Montana is to protect the state's equitable interest in the almost 44 million ac-ft of water that flow into or originate within the state each year. The threats are that downstream states, the federal government (through reserved, hydropower, or navigation rights), or out-of-state Indian tribes will establish their own rights in these waters, thereby constraining Montana's water future. The strategy, therefore, must be one of attempting to maximize and secure Montana's fair share of the waters flowing into or originating in the state. In short, the task is to develop a strategic water policy for Montana in its interstate setting.

In the Columbia River Basin, Montana's water future, if it is to be based on additional consumptive uses, is extensively constrained as a result of instream hydropower rights, which essentially tie up the Montana tributaries. The state may wish to vigorously seek subrogation of these hydro rights to certain consumptive uses in future relicensing proceedings before the Federal Energy Regulatory Commission (FERC), and this problem and possible approaches should be addressed by the permanent water oversight committee suggested at page V-51.

This report, however, generally concerns the problems in the Missouri Basin. What follows, therefore, is a discussion of the numerous possible components of a strategy for Montana to secure its fair share of Missouri River Basin waters. This "Level 4" response does not displace the recommendations set forth in discussing earlier strategies. Rather, it builds upon those earlier suggestions: i.e., water marketing may be important in putting water to use (Level 3) and allowing the exporting of water may be constitutionally required in any case (Level 2).

A "Level 4" response also does not require the adoption of all the components discussed in this section - only many of them. What is important is that the components not be considered piecemeal but as interrelated elements of an overall strategy - a plan.

These components are discussed in two groups: first, the set of steps Montana can undertake to "get its own house in order;" second, the set of steps the state can undertake in relation to the other states in the Missouri Basin. Many of the components are taken directly from the comprehensive and thoughtful Trelease report.<sup>236</sup> Others, including some which parallel Trelease's recommendations, were developed independently from the hearings, seminars, and deliberations of the committee.

1. "Getting our own house in order"

Montana needs greater data and certainty as to its present water uses and its future water needs. And, to the fullest extent possible, the state needs to reserve or put these waters to use as a defensive measure to prevent downstream states from obtaining prior legal or equitable rights in the water. The following suggestions, therefore, are the important components of "putting our own house in order." They are organized in three categories: (a) documenting and protecting existing water supplies and uses; (b) documenting and securing future water needs; and (c) other issues.

a. Documenting and protecting existing water supplies and uses

Accurate and complete data concerning water supply and uses are indispensable to sound water management by a resource agency. Such data, coupled with certificated water rights, are important in developing strategies for negotiating with other states and in formulating compelling equitable arguments for presentation, if need be, to the Congress or the Supreme Court. As previously noted (supra at pp. III-8-11) although the Supreme Court has the power in an equitable apportionment action to curtail existing water rights, it has never done so, and is less likely to take that action in the future if the state has adequate supporting data for its case.

The components under this category consist of developing a centralized water resource data management system, completing the general stream adjudications, and quantifying federal and Indian reserved water rights.

(1) Centralized water resource data management system

In the 1982 Trelease study, the authors found that:



In order to make their specific decisions, each agency collects the necessary data which are stored in separate agency files and, in many cases, are difficult to relocate. At the present time much of the water resource data is fragmented, neither indexed nor inventoried, not recorded in a standard format, and most importantly, not readily accessible to those who need the information for making management decisions.<sup>237</sup>

The study also reported that the state does not presently maintain data as to amount of water actually used by water claimants. Thus, the existing method reports maximum legal use rather than actual diversion.

The Trelease study suggested that centralized information is needed on the state's water resources, existing uses, and the potential for future development. As previously stressed in the present report, the identification of existing uses and future development potential is Montana's only line of defense to obtain a fair share in any interstate allocation. To meet this need, the Trelease report recommended the allocation of \$50,000 per year for the next five years for the development of such a centralized water resources data system.

Such a data system is important both to current Montana users and potential users, as well as to the state as it develops interstate water policy. The committee is concerned, however, about relying entirely on one data system to report on present and future supply and demand. The Legislature may well wish to consider requiring a periodic or ongoing audit or verification of water resource data maintained by DNRC. The purpose of the audit or verification would not be to duplicate functions already performed by the agency but to challenge or confirm the methodological assumptions and to systematically spot-check the data. The function could be performed by an independent auditor, perhaps on staff to the Legislature, or on contract. The function would go a long way in raising the level of confidence of Montana policymakers, including the Legislature and the department itself, in the water resource data that they utilize in determining their long-term water policy.

(2) Completion of statewide general stream adjudications

Chapter 4 (supra at pp. IV-1-3) discussed the role and importance of the adjudication of pre-1973 water rights underway in the five water courts of this state. To date, three final decrees involving 10,715 claims have been entered; and 26 sub-basins, involving 46,726 claims, were predicted by Judge Lessley to be covered by preliminary decrees by the end of 1984. Yet, one of the final decrees - the Little Powder River involving 10,302 - was completed under pre-existing law between 1973 and 1979. Thus, of the 200,000 plus claims that have been filed under the SB 76 procedure initiated in 1979, only one-fourth of them will have reached the preliminary decree stage five years later. While Judge Lessley has indicated that the adjudication process will be completed by 1990, the Trelease report speaks in terms of a 10 to 20 year period for finalizing all the decrees.<sup>238</sup>

It would be preferable, of course, to complete the adjudication process as soon as possible. A final adjudication cannot but help Montana's position in negotiations with other states, before the courts, or before the Congress. Yet, delay in the process is not expected to be devastating for Montana's interstate position. Also, some observers have commented that even the present speed of the process is sacrificing accuracy for expediency. The bold process is underway, indicating the resolve of Montana to quantify its water. The more than 200,000 claims of existing use are now on file and can be aggregated to support the state's position. They are, in themselves, persuasive arguments in support of Montana's equities.

Yet, the process can be accelerated if that is the choice of Montana decisionmakers. In informal discussions with DNRC, its officials have indicated that more money would speed the process.

Thus, the Legislature may wish to implement some measures to accelerate adjudication. These measures might include the allocation of additional staff resources to the water courts. The Legislature might require the Montana Supreme Court to expedite the final decrees by giving court calendar preference to these cases. The Legislature might even consider imposing a mandatory date for the completion of the process, although it is hard to imagine what consequences could be

imposed upon failure to meet the deadline that would not violate the due process rights of claimants.

Finally, the Legislature might consider a moratorium on sales of water - or even on the appropriation of water in excess of a certain amount - until the general stream adjudications are completed. In the El Paso litigation, the New Mexico federal district court recently declared a legislative moratorium in that state on certain appropriations of groundwater to be an impermissible restraint on interstate commerce.<sup>239</sup> The rationale of that decision was based on the fact that the moratorium was effective only for the southern portion of the state - an area where the City of El Paso, Texas, is actively pursuing groundwater rights. A statewide moratorium on either sales or permits - so long as it affects residents and nonresidents equally - might not run afoul of the interstate commerce clause.

### (3) Quantification of federal and Indian reserved rights

Federal and Indian reserved water rights are claims for both present and future needs. Because of the relationship between the quantification of these present and future rights and the general stream adjudication process discussed in the preceding subsection, these reserved rights must be discussed as part of Montana's need to document existing rights.

As previously indicated, (Chapter 4 at pp. 14-17) Montana's Reserved Water Rights Compact Commission represents a unique attempt by a state to quantify, with a minimum of litigation, the reserved rights claims of federal agencies and Indian tribes. Yet, as also discussed, the commission has been at work since creation in 1979, no agreements have been finalized, and the whole process is scheduled for expiration in June 1985. Thus, the Legislature is faced with the critical question of whether to renew the mandate of the Compact Commission. Although there are many other reasons that would argue for extending the life of the commission (e.g., minimizing tensions between the state and the Indian tribes), one major consideration of the Legislature during its 1985 session will be whether renewal will speed or delay the overall quantification and adjudication of water rights in the state. If



reserved rights are negotiated and finalized within the next 5 to 7 years, the compacts will mesh nicely with the completion date targeted by Judge Lessley. If negotiations drag on and ultimately reach impasse over the same period of time, the ensuing litigation will take us into the 21st Century. Completion of the general stream adjudication will remain hostage to the uncertainty caused by these outstanding, large, and frequently senior rights. Also, negotiations for an interstate compact will be hampered: Montana and other basin states will be uncertain as to how to bargain for the allocation of these rights.

In the event the Legislature chooses to renew the charter of the commission, the level of resources dedicated to the Compact Commission should be examined. The Legislature might encourage the development of joint water project proposals with Indian tribes as a means to satisfy both Indian claims and state needs. Also, the Legislature might statutorily provide some criteria upon which compacts should be negotiated (e.g., range of water available, off-reservation uses, authority of Indian tribes to market).

b. Documenting and securing future water needs

Accurate predictions of future water needs are important both to water resource management within a state and in preparation for negotiations or litigation with other states. Such information is also essential in dealing with Congress concerning water project funding and other issues such as a Congressional apportionment of the Missouri.

Preferably, however, Montana should go beyond mere predictions of future need. It should undertake all means available to secure legally protectable ("inchoate") rights in the water the state will need for its future. This subsection reviews three such methods: water development, the existing reservation system, and other means that have been proposed or used in other states. Water development, as indicated in the Trelease study, is "[t]he best way to claim water in an interstate allocation...."<sup>240</sup> Yet, it also is the most expensive. Water reservations are less expensive, but because they do not constitute permits to the water, they carry the risk that they will not be acknowledged in an interstate apportionment. The subsection concludes



with another method that is indispensable in any case: the development of a state water plan.

(1) Water development

Chapter 4 (supra pp. 20-21) discussed the status of Montana's water development program. As has also been discussed, the most significant limitation on new water project starts over the last several years has been the unavailability of federal funds. While federal officials have indicated the government's willingness to enter into cost-sharing with the states, little has developed. Wyoming, for example, has already appropriated \$200 million for the construction and enlargement of dams but the federal government has been slow to commit to any project. Many states, both because of the scarcity of federal dollars and the procedural delay when dealing with federal agencies, are going it alone in terms of constructing their own projects.

The Montana Legislature should consider whether to allocate additional funds or bonding authority for the construction of new water projects - including joint projects, where possible, with the federal government or Indian tribes. While less than 5 percent of the \$250 million plus bonding authority provided by the 1981 Legislature has been utilized, the slowness is due in part to the long time periods necessary to develop such projects. Additional funds could be used for technical assistance to develop project proposals, to construct the projects, to fund lobbying activities in Washington, D.C. in an effort to secure federal projects (preferably those pledged to the state as a part of the original Pick-Sloan Plan), or even to retrofit existing state or federal dams with hydrogeneration capacity to produce another stream of revenues for water development purposes.

The additional funds necessary for these water development projects, of course, will be hard to obtain. Suggestions have been made to pledge the receipts from water marketing, to use additional coal severance tax receipts, or to impose a new tax or fee on the severance or use of water.

Finally, the Legislature may wish to consider means to expedite water project approval (e.g., removing requirement for legislative approval of projects).

(2) Existing reservation system

Montana's innovative water reservation system<sup>241</sup> is a systematic means to identify future uses in a basin. While reservations operate like permits in that they are protected in most cases from subsequent appropriations within the state, they will probably not be recognized as inchoate permits in an interstate apportionment action. To the extent the reservation process represents a well-conceived attempt by Montana to manage and plan for the necessary future uses of its water, however, established reservations should be persuasive to the courts and Congress as a significant equitable consideration.

As has been previously seen, reservations have been completed only in the Yellowstone River Basin; and DNRC resisted, in the 1983 legislative session, starting the process in the Upper Missouri. Indications are that DNRC will recommend to the 1985 Legislature the initiation of reservations on some other streams.

Regardless of DNRC's position in 1985, the Legislature may well want to mandate the initiation and completion of reservations on certain basins within the state (especially the Missouri). As a less direct variation, the Legislature might simply require that reservations be completed by a certain date. The committee is recommending such a timetable for the Missouri River.

Success in the reservation process requires sufficient financing, technical expertise, and a better statewide understanding of the importance of the program. Thus, the Legislature needs to appropriate sufficient funds to encourage the process - perhaps including funds for a technical assistance team to help local governmental entities participate in the process. Also, the Trelease report has made two recommendations to strengthen the reservation process: (1) monitoring the existing reservations in the Yellowstone Basin to ensure that good progress is being made toward perfection of those rights<sup>242</sup>; and (2) allowing energy and industrial users to make reservations in their own

name on both the Yellowstone and Missouri.<sup>243</sup> If Montana does not revive its ban against the exportation against water, thereby facilitating the regional movement of water for beneficial uses, the latter suggestion might actually result in the reservation of large quantities of industrial water for eventual out-of-state use.

### (3) Other reservation-type mechanisms

The core purpose of a reservation-type system is to preserve priority to a sufficient quantity of water to meet the state's anticipated needs. The system must be (a) flexible enough to allow the shifting of uses as actual needs are realized, and (b) secure enough that the priority date and claimed quantity are preserved. Montana does have a flexible reservation system. Other proposed mechanisms, some used in other states, may promise more security of right - especially as against the claims of other states. For instance, South Dakota allows the issuance of "energy industry use" permits to the South Dakota Conservancy District, a state agency set up to promote water development.<sup>244</sup> The usual due diligence requirements do not apply to these permits.

Water reservations might also be aided by an innovative suggestion we discussed in the preceding section. The proposal was that Montana, by appropriating in its own name some or all currently unappropriated water, could develop a water marketing program giving the state maximum control over such sales and the amount of water moving out-of-state. As mentioned there, this suggestion has developed from a line of U.S. Supreme Court decisions based on the "market participant" theory and a recent study by the New Mexico Legislature.

Such a state proprietary system could be meshed nicely with the existing reservation system. After appropriating all unappropriated waters - including those now set aside under the reservation system - the state (perhaps through a state-created trust or corporation) could acknowledge the local reservations as "first options" on state-appropriated water. The state simply would have to refrain from selling the water needed to meet the instream reservations of the



Department of Fish, Wildlife and Parks and other reservants. As to remaining state-appropriated water, the state could sell or not sell as it chose.

Even without detailed study, there are three apparent limitations on this proprietary proposal. First, it does presuppose the marketing of Montana's unappropriated water. Numerous questions concerning price, sales systems, disposition of proceeds, and whether existing rights also could be sold need answers.

Second, even though the water is appropriated, this fact alone will not immunize the water from interstate apportionment by the Supreme Court. The water must be put to use or, as part of an overall state plan, must be reasonably necessary for future uses before equities develop in favor of the state. Such a significant unilateral action would no doubt heighten interstate conflict and accelerate judicial or congressional apportionment.

Third, it requires state appropriation of some or all of the unappropriated water - a result that many citizens may find distasteful.

Yet, even with these difficulties, the proposal promises one extremely important result: a means to retain waters within Montana without violating the interstate commerce clause.

The Trelease report has made its own recommendation for a specialized reservation process for Montana's portion of the Missouri.<sup>245</sup> While special legislation would be required to implement this reservation process, it would be similar to the existing process. The various phases of the procedure would be: (1) an inventory of water development potential in the basin; (2) through the Water Development Program, a comprehensive determination of Montana's water needs in the basin; (3) input from other agencies and the interested water users; (4) preparation of environmental impact analysis; (5) public hearings; and (6) reservation, by either the Board of Natural Resources and Conservation or the Legislature, of the quantities of water in the basin necessary for Montana's future use. The report has estimated the expense of such a process to be \$600,000 over five years.



(4) Development of state water plan

Section 85-1-203, MCA, which was originally passed in 1967 and revised in 1974, requires that DNRC formulate, and with the approval of the board adopt, "a comprehensive, coordinated multiple-use water resources plan" for the state. The plan, which can be formulated and approved in sections, is required to set forth "a progressive program for the conservation, development, and utilization of the state's water resources and to propose the most effective means by which these water resources may be applied for the benefit of the people." The section requires that the plan be adopted only after properly noticed public hearings. Additionally, the plan must be submitted to each general session of the Legislature.

While DNRC has undertaken many specific water studies in the state,<sup>246</sup> including the Trelease report, it is unclear whether these are considered by the department as being the state water plan. There have been no public hearings advertised in accordance with the statute. The board has not approved any document or set of documents as components of the plan. Most importantly, no such plan has been submitted to the Legislature in preceding sessions. Although DNRC has given indications that such a "plan" will be submitted to the 1985 Legislature, whether it will have been scrutinized through the required public hearings is unclear. Thus, if the plain language of Section 85-1-203 is applied, Montana does not have a state water plan.

Courts apply the plain language of statutes. Compliance with Section 85-1-203 is no mere procedural nicety. It is an indispensable prerequisite for demonstrating, in any interstate apportionment action, that Montana has systematically and thoughtfully planned for its water future. As recently as June 4, 1984, the U.S. Supreme Court, in ruling against Colorado in an equitable apportionment action (Colorado v. New Mexico), indicated that:

[I]t would be irresponsible use to apportion water to uses that have not been, at a minimum, carefully studied and objectively evaluated, not to mention decided upon. [W]e find ourselves without adequate evidence to approve Colorado's proposed diversion. Colorado has not committed itself to any long-term use for which

future benefits can be studied and predicted. [W]e have not asked for...precision. We have only required that a State proposing a diversion conceive and implement some type of long-range planning and analysis of the diversion it proposes. Long-range planning and analysis will, we believe, reduce the uncertainties with which equitable apportionment judgments are made.<sup>247</sup>

Montana's long-range planning is no doubt more advanced than Colorado's. Yet, the state is vulnerable to the extent it does not comply with its own statutory requirements for the development of the state water plan. Montana's equities are improved in an interstate setting if it develops a plan denominated as such and involving the public, and the Legislature.

c. Other steps

Three other steps could be taken by the Montana Legislature to assist in "putting our house in order." They are (1) to impose a severance tax or fee on the use of water in this state; (2) to establish a water oversight council or committee; and (3) to better coordinate water research for the greater benefit of the state.

(1) Severance tax or other fee<sup>248</sup>

The State of Montana could consider imposing a severance tax on the extraction of water or some other tax or fee on the use of water within the state. The purpose of such a levy would be to raise money for water development of other state purposes, to encourage the conservation of water, and, if a progressive tax or fee structure, to discourage the use of large quantities of water (many such uses would be out-of-state).

In fashioning any such levy, great care must be taken to avoid creating impermissible restraints on interstate commerce. In Montana's coal severance tax case, Commonwealth Edison Co. v. Montana,<sup>249</sup> the U.S. Supreme Court relied on the four-part test originally set forth in Complete Auto Transit, Inc. v. Brady.<sup>250</sup>

(a) Substantial nexus - The activity being taxed must have some nexus, or connection, with the state imposing the tax. The mining of coal within Montana is clearly a sufficient nexus for the coal severance

tax. Similarly, the extraction or diversion of water within Montana is a sufficient nexus with the state.

(b) Fair apportionment - Taxes on interstate activities must be fairly apportioned so that interstate taxpayers are not exposed to multiple taxation. The coal severance tax was upheld because the mining of Montana coal can only take place in Montana. Water extractions or diversions also seem to be free from the dangers of multiple taxation, although difficulties might arise with already taxed return flows.

(c) Evenhandedness - The third prong of the Complete Auto Transit test is that taxes or fees must not discriminate against interstate commerce. The Court, in Commonwealth Edison, held that the legal incidence of the tax, and not the actual incidence (in cases where most if not all of the tax is shifted forward to out-of-state taxpayers), is the controlling consideration.

Such a severance tax would be levied on the extraction of water from its natural waterway, lake beds, or from the ground. The tax could probably be imposed on water extracted from state and federal reservoirs although, because such reservoirs trap water which other wise would not be available for use, the levy in such a case is not justified by the "replacement of nonrenewable resources" rationale. The distinction, however, is probably not of constitutional importance usually associated with such taxes. The federal government and Indian tribes, under the doctrine of intergovernmental and tribal tax immunity, would be exempt from such a levy. Extractions by other parties pursuant to federal water contracts, however, would be taxable events.

Extractions for municipal and domestic uses would also be taxable. While the municipality would be the legal taxpayer, it would be able to apportion the ultimate incidence of the tax among its users.

(2) Water oversight committee

As has been seen throughout this report, water is a resource particularly important to the future of Montana. Policies concerning water are too important to be made in a vacuum or by one agency. Coordinated and well-reasoned policies must be developed with the participation of the Legislature, other involved agencies, and the



public. In exercising its role in appropriating money or approving compacts, the Legislature must understand the context of such actions and must accept them as integral parts of an overall state water strategy. Likewise, other agencies must be able to express their concerns about proposed policies and be able to coordinate their own actions (e.g., to avoid recurrence of the embarrassing conflict between the Reserved Water Rights Compact Commission and other state agencies concerning compacts proposed for approval during the 1983 session). Finally, the general public must understand the rationale for water policies so as to be supportive; and many citizens have valuable expertise to render in the development of water policy. These concerns argue for the creation of a permanent committee, commission, or some other entity devoted to the monitoring, if not the development, of Montana's water policy.

The Montana Legislature has occasionally had a special interim committee on water, but the most recent version was discontinued in 1983, apparently with the expectation that the EQC would assume such responsibilities (which it has). The executive branch has had similar committees over the years.

A water policy or oversight committee may now be important to the state as a means to elevate and focus discussions concerning Montana's water future. Such an entity may need to be permanent because water issues are dynamic and are expected to be of major regional importance into the 21st Century. The specific responsibilities for such an entity could be drawn from the following list of possibilities:

- o to advise the governor, the Department of Natural Resources and Conservation, the Legislature, or all of the foregoing on water policy issues;
- o to monitor those water developments within the state, in the region, in Washington, D.C., and throughout the nation which have ramifications for Montana;
- o to gather, keep, monitor, and/or evaluate water resource data - both within the state and throughout the region;
- o to promote, develop, prioritize, and/or monitor water develop-



ment activities within the state;

- o to advise, coordinate, or approve water research projects undertaken by state agencies or institutions;
- o to develop the state water plan;
- o to develop and oversee both a defensive and offensive strategy for Montana vis-a-vis other basin states; and
- o to oversee or engage in negotiations with other states concerning issues of shared interest - including the development of interstate compacts.

During the next biennium, particularly important issues for discussion by such an entity could include:

- o constraints on consumptive use and water development brought about by extensive hydropower reservations in both the Missouri and Columbia basins;
- o oversight of the quantification of pre-1973, Indian, and federal reserved water rights;
- o the need for an improved, centralized water resources data system - including the consideration of the adequacy of water research, currently underway in state agencies and institutions, in meeting state policy and management needs; and
- o the content of the state water plan.

In the case of an advisory entity, a committee or commission could be formed by executive order; but for a group with policymaking authority, legislative action would be necessary. Various organizational possibilities exist:

- o a committee consisting of other agency personnel and/or public members appointed by, and answerable to, the governor and/or the DNRC;
- o a permanent oversight committee of the Legislature with only legislative members (the final recommendation of the Select Committee;
- o an interim committee of the Legislature with only legislative members;

- o a permanent subcommittee of the Environmental Quality Council;
- o an independent or quasi-independent commission with legislative, executive, and lay representation with its own budget and staff.

Regardless of the actual design, such a committee, commission, or other entity would promise to encourage and enrich the dialogue concerning water issues affecting the state. Understanding and support for resulting state policies would be encouraged involving other agencies, the Legislature, and members of the public.

### (3) Coordination of water research

Adequate and relevant research is important to the development of Montana's water policy. Yet, much of the ongoing research is fragmented among various state institutions and agencies including DNRC, the Water Resources Research Center at Montana State University, and the Montana College of Mineral Science and Technology at Butte. While there are examples of excellent research projects, much of the completed research is not relevant to critical water issues facing the state - particularly those concerning state policies in an interstate setting. Also, the total amount of money spent on water research in the state may be in insufficient proportion to the importance of the issue to the state and its citizens. For instance, the Water Research Center at Utah State University, through aggressive efforts to secure grants and contracts, now has an annual operating budget in excess of \$4 million. By comparison, the Water Resources Research Center at MSU has an annual budget for FY 84 of \$110,000 in federal funds, plus \$15,000 in state funds and some matching state in-kind services.

At a minimum, the Legislature should further inquire as to means by which state water research can be better coordinated to serve the important policy development needs of the state. While the Legislature should scrupulously avoid interference with the academic freedom of the state universities and their faculty members, advisory and coordinating mechanisms should be explored as means to improve the service of water researchers to state policymakers.

## 2. Relating to other states in the Missouri River Basin

In addition to taking those steps necessary to "getting our own house in order," Montana needs to have a thoughtful strategy regarding its relationships with other states in the Missouri River Basin. This strategy must encompass what policies Montana wishes to work for in the basin, as well as what posture Montana will take in relation to the actions of the other basin states. For the purpose of this discussion, this strategy is discussed as follows: (a) preparations for litigation; (b) preparations for interstate negotiations; and (c) securing Congressional action in response to Sporhase v. Nebraska.

### a. Preparations for litigation

While nonjudicial conflict resolution is preferable in most instances, it is inevitable that the State of Montana will have to engage in some litigation concerning Missouri Basin water issues. Most seriously, Montana may ultimately have to participate in a basin-wide equitable apportionment action before the U.S. Supreme Court. (As will be recalled, similar litigation involving the Colorado River was pending before the Supreme Court for decades.) Even relatively minor interstate disputes can result in major litigation before the Supreme Court. The Attorney General's office and DNRC must be prepared for the inevitability of such litigation. Fortunately, such preparations also lay the foundation for the state's posture in interstate negotiations.

The Trelease report recommended several measures to prepare the state for such litigation. Other suggestions have been forwarded by others in testimony or papers prepared for the committee. These various suggestions can be set forth as follows:

#### (1) Contingency fund for litigation

The Trelease report recommended the appropriation of \$200,000 contingency fund to aid the Attorney General in preparing for an intra-basin lawsuit concerning the interpretation of the O'Mahoney-Milliken Amendment. The funding would "provide for the filing of motions, for the preparation of briefs submitted either as intervenor or as a friend of the court, for setting forth the requirements for participation in a major lawsuit, and for developing tactics to put

Montana in the best position to prove and protect and its water claims."<sup>251</sup>

Neither DNRC nor the Attorney General's Office requested such a contingency fund from the 1983 session, and it is likely that no such request will be made of the 1985 Legislature (although the Attorney General's office has requested almost \$600,000 for its Indian legal jurisdiction project over the next biennium). Such a contingency fund would be desirable. With biennial sessions of the Legislature, Montana's participation in important litigation might be hampered by insufficient funds with no means to secure additional resources short of a special session of the Legislature. For another, while \$200,000 may not be needed, a lesser sum may be required to protect Montana's interest in ongoing litigation which raises the issue of which federal agency has authority to sell water from federal reservoirs.<sup>252</sup>

(2) Monitoring Washington, D.C. and regional developments

The Trelease report makes several suggestions about monitoring developments concerning the 1944 Flood Control Act and O'Mahoney-Milliken Amendment, specifically, and other regional and Washington, D.C., developments, generally. Because the Trelease report sees the Flood Control Act and the Amendment as the basis of Montana's argument that there has been an appropriation of the river to provide for upstream consumptive uses, the report's authors feel that Montana should be wary of any effort to modify or weaken the statute. Additionally, the report suggests that its legal interpretation of the Flood Control Act and O'Mahoney-Milliken Amendment be verified by the Attorney General and the state's water managers and that supporting economic arguments (i.e., upstream development is more economically efficient than downstream navigation uses) be developed.<sup>253</sup> The Trelease report also suggests monitoring other federal and regional activities which affect Montana's water interests - especially water project funding, coal slurry legislation, or the proposals of the High Plains Project to divert Missouri River water to recharge the Ogallala aquifer.<sup>254</sup>



While the Attorney General's office and DNRC are familiar with Trelease's legal interpretation of the Flood Control Act and the O'Mahoney-Milliken Amendment, there is no indication that the Trelease legal opinion has been reviewed in any critical, systematic way - such as through a second, independent legal analysis or "worst case" analysis. Neither department requested additional funds in 1983 for such a monitoring effort, and neither is anticipated to make such a request to the 1985 Legislature. DNRC, in particular, apparently intends to rely on Montana's existing Washington, D.C. office and other sources of information to monitor such developments. The Legislature may wish to make its own judgment as to whether this monitoring function is adequate and whether additional resources should be expended (e.g., additional DNRC staff, a dedicated position in Montana's Washington, D.C. office).

### (3) Modeling other states' interests and strategies

One of the essential aspects of both a litigation and negotiation strategy is the anticipation of the other party's position and moves. In its highest form, such preparation involves "modeling" the other party's interests, positions, and actions in various hypothetical situations followed by developing carefully selected responses to the other party's actions. In a litigative situation, this modeling yields litigation strategy to effectively counter the initiatives of the other party. In a negotiating setting, modeling helps to identify those areas of common interest around which agreements can be forged.

One commentator, Gary Weatherford, has suggested to the committee that such modeling should be undertaken by DNRC and the Attorney General's office both as a means to prepare for litigation and to identify shared interests with other basin states upon which consensus might be reached.<sup>255</sup> While DNRC does monitor water planning and other water-related developments in the other basin states, Weatherford's suggestion is for a more systematic, rigorous modeling exercise. This modeling process would involve:

- o monitoring water activities in other basin states including proposed or passed legislation, water budgets, state water

plans, litigation;

- o monitoring public opinion of other states through newspaper articles, policy positions of civic and political organizations, available public opinion polls, statements of public leaders;
- o identifying possible scenarios (e.g., prolonged drought in region, awards of large Indian water rights) and predicting the probability of each;
- o role playing exercises in response to the alternative scenarios where the actions and interactions of all basin states are modeled based on their predicted responses; and
- o in light of the role playing exercises, evaluation of Montana's best strategy in each of the hypothetical situations.

Such modeling is expensive and probably requires the assistance of outside consultants to complete. Such a process should also be ongoing. After the process is set up, however, it probably could be updated as an in-house activity of DNRC or the Office of the Attorney General. Perhaps one person or unit should have overall responsibility for coordinating this preparation.

b. Preparations for negotiations

As has been mentioned (supra p. 13), there is growing interest in the negotiation of an interstate compact to apportion the waters of the Missouri River among the basin states. While some individuals<sup>256</sup> feel that none of the states are ready for a compact and that its completion is probably 10 or 20 years away, most observers and participants in basin water issues believe that necessary preliminary steps should be undertaken. One such effort has been the development of a common water resources data base by the members of the Missouri Basin States Association.

The Trelease has suggested that there is the preliminary need to resolve some of the unresolved issues remaining from the execution of the Yellowstone River Compact among Montana, Wyoming, and North Dakota

in 1950. In particular, the report points to the following issues as needing resolution:

- o determining each state's share of water under conditions of water scarcity;
- o developing a water accounting and forecasting system;
- o determining the water rights of the Crow and Northern Cheyenne tribes and their effects on the compact allocation;
- o apportioning the Little Big Horn among Montana, Wyoming, and the Crow tribe;
- o determining whether Wyoming's allocated share may be diverted from the Yellowstone in Montana and channelled back to Wyoming; and
- o determining the constitutionality of Article X of the Compact which requires unanimous approval of the signatories before Yellowstone River can be transported out of the basin.<sup>257</sup>

The Trelease report estimates that \$200,000 over 4 years is necessary to resolve these issues.

In addition to funding efforts to remove the uncertainty resulting from the Yellowstone Compact, the Legislature faces the larger question of what steps, if any, should be taken to encourage and accelerate the negotiation of an interstate compact in the Missouri. Several individuals have suggested<sup>258</sup> that Montana should take the lead in negotiating such a compact.

If the Legislature seeks to encourage and accelerate the compact process, several steps could be undertaken. At a minimum, Montana should pay its dues for the current year to the Missouri Basin States Association and budget for the payment of the dues during the next biennium. A second option would be for the Legislature to mandate compact negotiations as a priority activity for DNRC. A third option would be to designate a special negotiator for the state for the purpose of initiating negotiations with the other states. The negotiator could be a contract consultant having exceptional experience in environmental or labor/management negotiations. Or, an "Office of Special Negotiator" could be created employing a full-time person and necessary staff. The

fourth option is to vest negotiating responsibility in a special legislative committee, water oversight committee, or some other entity. A final option, perhaps in conjunction with other basin states, would be to petition Congress for consent to commence negotiations for such a compact.

Many of the research and modeling activities discussed in the preceding section are as important in preparations for negotiations as they are to prepare for litigation. Thus, any steps to encourage the negotiations process should be accompanied with sufficient staff and other resources to ensure that Montana's position is carefully formulated. We need only to remember our earlier discussion (supra at pp. III-13-16) of the apparent error of the Upper Colorado River Basin States in agreeing to guarantee 7.5 million acre feet of water per year to the Lower Basin to appreciate the serious consequences of lack of preparation and miscalculation in interstate negotiations over water.

### 3. Evaluation

See Table 18 on pp. V-60a and V-60b for overall evaluation of Level 4 response.



TABLE 18:  
Evaluation of Level 4 Response:  
Strategies to Maximize Montana's Fair Share  
of Missouri River Basin Water

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How well does a Level 4 response . . .

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Protect existing consumptive uses?

High level of protection through completion of general stream adjudications and development of water resources data system

Also, high level of protection vis-a-vis other states through diligent monitoring of regional and national developments and preparation for interstate litigation

In event favorable compact or equitable apportionment decree are secured, almost absolute protection of existing uses from claims of other states and users in those states

Protect Montana's anticipated future consumptive uses?

Use of reservation-type system and comprehensive state water plan provides moderate level of protection from claims of other states

Aggressive water development provides high level of protection from claims of other states

Development of water resources data system enables state policymakers and water managers to better anticipate growth, develop new supplies, encourage conservation

Quantification of federal and Indian reserved rights, however, may accelerate the finalization of large awards which will limit the future options of the state. This impact may be mitigated through cooperative activities (e.g., joint water development projects)

State appropriation and marketing of unappropriated water allows state to allocate water for future use in any fashion it chooses

Protect instream values, water quality, and the public trust interest in the waters?

The success of Montana's inter-Basin strategy may actually diminish instream values and water quality as the state gains legal rights, vis-a-vis other states, to put Missouri waters to consumptive use.

State appropriation and marketing of unappropriated water allows state to withhold from sale as much water as necessary to protect instream values

**Maximize for Montana's benefit the economic value of the waters?**

Greater certainty as to Montana's share of the water vis-a-vis other states, Indians, and the federal government will increase the value of Montana's water

Water development enables water to be put to productive use

Severance taxes or other levies encourage conservation of the resource and provide a stream of revenues to the state

Severance taxes or other levies enable state to capture economic rents and thereby prevent unjust enrichment of private appropriators

Uniform taxes or levies encourage economic efficiency through marginal cost allocation of water among various uses

State appropriation and marketing of un-appropriated water ensures that all economic rents are captured by state

**Protect and enhance intergovernmental, interstate, and state/tribal relations?**

Efforts toward litigating and negotiating intra-Basin, Indian/state, and federal/state disagreements probably heightens conflict over the short-term but reduces it over the long-term as agreements or judgments are reached

**Lend itself to administrative feasibility?**

The components of this strategy, both individually and collectively, require leadership, adequate financial resources, and meticulous coordination

Additional agencies (*e.g.*, state entity to appropriate water, water oversight committee, special negotiator) need be set up

**Lend itself to political feasibility?**

Because the components of this strategy are resource intensive, they are difficult to adequately fund in a time of austerity

Because of the large number of components to this strategy, tends to mobilize greater number of opponents whose individual complaints combine to make comprehensive approval of the strategy difficult

**Note:** Bold type distinguishes changes in evaluation from Level 3 response.

## CHAPTER 6: COMMITTEE RECOMMENDATIONS AND COMMENTARY

The following constitute the complete and final recommendations of the Select Committee on Water Marketing. They were unanimously approved by the seven members of the committee in attendance on December 3, 1984. Where required, these recommendations have been incorporated with the proposed legislation set forth in Appendix D.

### A. Regulating the Interstate Movement of Water

#### 1. Ban on the exportation of water

##### Recommendation:

The committee finds that under appropriate circumstances (and as has been the policy for the last two years) the exportation of Montana's water is not in conflict with the public welfare of its citizens or with the conservation of its waters. Thus, the committee recommends that the statutory ban on the exportation of water from Montana (MCA § 85-1-121), which is scheduled to come back into operation of law on July 1, 1985, should not be allowed to revive. The present freedom for water to move interstate, when coupled with the other recommendations of the committee, should be allowed to continue.

##### Commentary:

With the passage of HB 908, the 1983 Legislature temporarily suspended the provisions of MCA § 85-1-121 that had prohibited the export of water outside the State of Montana unless approved by the Legislature. This suspension was in response to the uncertainty as to the constitutionality of the statute raised by the U.S. Supreme Court's decision in Sporhase v. Nebraska (1982). In its place, the Legislature expanded the criteria enumerated in MCA § 85-2-311 to guide the issuance of a water permit. By the terms of HB 908, these new provisions are to expire on June 30, 1985, with the revival of the pre-existing law, including the export ban.

The Sporhase decision held that Nebraska's statute, which banned the export of groundwater except under limited circumstances, violated

the "dormant" interstate commerce clause. Similar litigation concerning the constitutionality of New Mexico's own anti-export ban has been underway in the case of El Paso v. Reynolds. Also, the case of Altus v. Carr (1966) found unconstitutional a Texas statute almost identical to MCA § 85-1-121.

While not completely free of ambiguity, these cases give us helpful guidance in evaluating the constitutionality of Montana's export ban. While each of these three cases involved a prohibition on the exportation of groundwater, we should expect no different analysis by the courts when a state attempts to ban the exportation of surface water. In fact, surface water is more of an interstate commodity than groundwater and invites more scrutiny from the courts in application of the interstate commerce clause.

The conclusion seems inescapable that the provisions of MCA § 85-1-121 are unconstitutional. It is true that the Sporhase decision, in general, allows a state to impose some burdens on interstate commerce as a result of its water management policies and specifically allows measures by arid states to achieve water conservation for health, welfare, and safety purposes. Such restraints must, however, be closely tailored to achieve the conservation purposes intended.

The provisions of MCA § 85-1-121 fail to achieve such a closely tailored fit. While the section does not impose an absolute ban on exporting, due to the Legislature's ability to approve such a diversion, the discretion given to the Legislature is unduly broad. No criteria to guide the Legislature's consideration of an export petition are set forth; thus, the decision could be made on any basis. Also, the export petition is not required to be reviewed by DNRC prior to its submission to the Legislature. Consequently, there is no assurance that an export petition would ever be subjected to expert water management scrutiny so as to determine whether the proposal threatens to endanger the health, welfare, or safety of Montanans.

The Legislature has not been faced with a petition for the exporting of water so it is uncertain how such a petition would be processed.



While it is possible that the constitutionality of the statute could be salvaged by careful legislative scrutiny of the petition on the basis of water conservation considerations, the Legislature would still face a heavy burden of justifying any denial.

Proposed language:

[See Section 24 of the bill]

2. Permit criteria

Recommendation:

The committee recommends that the public interest considerations enacted in 1983, which govern the issuance of water permits in the state (MCA § 85-2-311), be continued. The committee suggests that these criteria be strengthened by including provisions which were recently approved by a federal court in New Mexico. The committee also suggests that, in certain instances, these public interest criteria apply to applications for a change in use of water. Under certain circumstances, the Department of Natural Resources and Conservation should undertake rulemaking to more completely implement the permit criteria.

Commentary:

In 1983, the Legislature strengthened the criteria contained in MCA § 85-2-311 governing the issuance of water permits. This modification, effective for two years, added the following major features to the criteria (commonly called "public interest criteria"). In permit applications for appropriations of 10,000 ac-ft/yr or more or 15 cfs or more:

(1) a determination that the proposed appropriation is "reasonable" based on the following considerations:

- (a) existing and future demands for water;
- (b) anticipated benefits to the applicant and state;
- (c) effects on the quantity and quality of water;
- (d) possibility of saline seep; and
- (e) probable, significant adverse environmental impacts; and

(2) for consumptive diversions in these amounts, approval of the Legislature.

These provisions are scheduled to expire on July 1, 1985; and the old version of section 85-2-311 is scheduled to revive. The committee, however, has received favorable public comment concerning the temporary provisions of MCA § 85-2-311. In general, the committee believes such provisions can safeguard many of the state's concerns about the export of water and coal slurry pipelines and should be reenacted.

Additionally, however, the committee believes that several provisions drawn from New Mexico (and that have been approved by the federal district court there), if coupled with Montana's statute, could significantly protect Montana's valid interest when proposals are made to move water interstate. Specifically, proposals for the out-of-state movement of water would have to be evaluated against the following additional criteria:

- (1) whether there are water shortages in Montana;
- (2) whether water subject to the application could feasibly be transported to alleviate shortages in Montana;
- (3) the sources of water available to the applicant in the state of destination; and
- (4) the demand being placed on the applicant's sources and supply in the state of destination.

Acting upon the recommendation of DNRC, the committee believes the water quantity necessary to trigger application of the public interest criteria should be reduced to 4000 ac-ft/yr or more and 5.5 cfs or more. This reduction would not be onerous to applicants as only 56 out of more than 8,000 permit applications since 1973 have been of this magnitude.

At present, the protective public interest criteria do not apply to change of use applications for existing water rights. Thus, existing water rights might be transferred to another use although, under the public interest criteria, water could not be appropriated for such a use. In order to ensure that the public interest criteria apply across

the board, the committee recommends their application to certain change of use applications of 4,000 ac-ft/yr or more and 5.5 cfs or more.

Table 19 sets forth the circumstances under which appropriated water might move out-of-state or out-of-basin under the proposed permit criteria.

Proposed language:

[See Sections 4 through 7 of the bill]

3. Water for coal slurry purposes

Recommendations:

The committee recommends that Montana's ban on the use of water as a medium to transport coal in a pipeline be removed. The use of water in a coal slurry pipeline should be recognized as a beneficial use of water. This recommendation is expressly conditioned on the passage of other recommendations made by the committee to protect the state, its environment, and its citizens from the potential damage that can be caused by such pipelines.

Commentary:

Section 85-2-102, MCA, defines the beneficial use of water to mean a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses. Also, MCA § 85-2-103 makes clear: "(1) the Legislature finds that the use of water for the slurry transport of coal is detrimental to the conservation and protection of the water resources of the states; and (2) the use of water for the slurry transport of coal is not a beneficial use of water."

The coal slurry ban, as presently constituted, results in some potentially strange results. Surprisingly, it bans neither the transport of coal by pipeline nor the use of water in a pipeline. What it does ban is the mixing of the two substances in a pipeline.

A coal slurry pipeline can be built and operated in the state so long as the medium for transport is other than water (e.g., methane,

liquid carbon dioxide). Also, water can be used as the medium in a slurry pipeline so long as the substance being transported is not coal (e.g., grain, other minerals). Even though the coal slurry ban has been justified on the basis of minimizing negative environmental impacts, the construction of a pipeline for the conveyance of coal (without water) or other substances (with or without water) is not subject to permitting under the state's Major Facility Siting Act or any other statewide regulatory scheme (except for possible requirement of an environmental impact statement under the Montana Environmental Policy Act).

The Sporhase case recognizes the legitimacy of state conservation measures "to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens...." The questions for Montana, however, become (1) whether such a ban violates the equal protection clause of either the U.S. Constitution or the Montana Constitution; and (2) whether a ban against coal slurry pipelines violates the "dormant" interstate commerce clause of the federal Constitution by impermissibly burdening commerce between the states.

Numerous experts have provided the committee with their views as to the constitutionality of the coal slurry ban. Their views have generally been mixed. Supporters of the ban have indicated that Montana has both a strong constitutional and statutory basis for the conservation of natural resources. They argue that coal slurry is a totally consumptive water use, unlike many industrial uses; that it requires continuous, large amounts of coal to operate; and that it has other environmental impacts in the construction and operation of the pipeline. The ban, therefore, represents a state policy whose purpose is to closely regulate the speed and intensity of coal development.

Critics of the statute argue that the coal slurry ban is irrational in relationship to its stated purposes and cannot be sustained. The ban does not conserve coal, as the mineral can be moved by other transportation modes or, even, by pipelines using a transport medium other than



water. Nor does the ban conserve water; water can be used for all other forms of pipelines.

Critics of the statutory ban also argue that "coal slurry pipeline transportation systems, simply because of their size and economic scale, contemplate the interstate movement of coal to distant markets." As these pipelines generally use water as the medium of transport, a ban on the appropriation or use of any water, regardless of its quality, may unreasonably interfere with interstate commerce. Montana's interest in protecting and conserving its waters can be pursued through other means having less impact on interstate commerce.

The committee is of the judgment that the constitutionality of the coal slurry ban could be sustained against an equal protection attack. The committee, however, agrees with the observation of Professor Albert Stone of the University of Montana School of Law: the constitutionality of the coal slurry ban under the interstate commerce clause is "a close question, too close to permit reliance upon the statute." The consequence of the state being wrong in terms of the ultimate defensibility of its ban are severe: the water could be appropriated without significant payment to the state, the pipeline could be constructed outside any significant state regulation (except the Montana Environmental Policy Act), and the state could be liable for the prevailing party's attorneys fees.

Proposed language:

[See Section 25 of the bill]

4. Coverage of pipelines under the Major Facility Siting Act

Recommendation:

The committee recommends that the siting of all future pipelines exceeding 30 miles in length and 17 inches in diameter be covered by the provisions of the Major Facility Siting Act (MFSA). The DNRC should continuously monitor slurry technology to ascertain whether this standard provides sufficient protection to the state.

Commentary:

Montana's Major Facility Siting Act requires that a major facility (usually an energy-related facility) obtain a certificate of environmental compatibility and public need from the Board of Natural Resources and Conservation prior to construction. The certificate is considered by the board only after an extensive application has been submitted with an opportunity for federal, state, and local governmental agencies, as well as the general public, to comment on it. The application also receives a thorough evaluation from DNRC, which forwards its recommendations to the board.

Coverage by the MFSA results in a comprehensive review by the board of numerous environmental and economic considerations. At present, there is limited coverage of pipelines under the Siting Act. Under current law, if pipelines run to or from a large energy facility located in or out of Montana, the pipeline and its associated facilities must be constructed in accordance to a certificate issued by the board. This application is very limited however in that pipeline developers could easily tailor new coal slurry pipelines to circumvent this limited coverage.

Coverage of certain large pipeline projects under the public need provision of the Siting Act would appear justified on the same basis that other large projects are under the Act: if the public is to invest in public works and services to support the construction and operation of such projects (as well as to mitigate their negative impacts), then the taxpayers should be afforded an independent review of the feasibility of the project.

The committee also feels that environmental compatibility is another reason to place large pipelines not running to major energy facilities under the Siting Act. Because the committee is concerned with minimizing environmental damage along the construction route, all pipelines in excess of a certain length and width should be covered.

Proposed language:

[See Sections 8 through 13 of the bill]

B. State Water Leasing Program

5. Limited water leasing program

Recommendation:

The committee recommends establishing a limited state water leasing program involving a total of 50,000 acre feet of impounded water. A lease from the state would be required to obtain water in any amount for transport outside the specified river basins or for uses where water in excess of 4,000 ac-ft/yr and 5.5 cfs is consumed. All such leases would be reviewed under the public interest criteria of MCA § 85-2-311; and an environmental impact statement would be required in most instances. Lease terms would be 50 years or less and could be renewed.

Commentary:

The details of the limited water leasing program recommended by the committee are as follows. Administered by DNRC, water would be leased from the state under two prospective circumstances:

(a) whenever water in any amount is being sought for transport out of the following river basins: the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho; the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia; the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta; the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota; the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and the Yellowstone River to its confluence with the Missouri River in North Dakota; or

(b) for uses where water in excess of 4,000 ac-ft/yr and 5.5 cfs would be consumed.

Only a total of 50,000 ac-ft/yr of water could be leased under this program for the foregoing two purposes. As water was leased, water would be appropriated in the name of the State of Montana and a certificate issued to DNRC. In the event lease applications exceeded

50,000 ac-ft/yr, DNRC would have to return to the Legislature for additional leasing authority.

The source of water for the leasing program would be impounded water from any reservoir within Montana. Water could not be leased from a reservoir in a basin for which a pending or final decree under the general stream adjudication program had not been entered. This restriction would not apply to Fort Peck, for which the state has an existing water purchase and revenue sharing agreement with the U.S. Bureau of Reclamation, and Tiber, Canyon Ferry, Hungry Horse and Yellowstone reservoirs, once memoranda of agreement have been executed. The committee strongly urges that DNRC negotiate (or renegotiate, in the case of Fort Peck) memoranda of agreement covering all federal reservoirs within the state and water purchases for all types of uses (not just industrial).

Water would be leased through bilateral negotiations. Upon receipt of an application to lease water, DNRC would evaluate the proposal with reference to the public interest criteria of MCA § 85-2-311(2) [as proposed in this report], regardless of the amount of water involved. For proposals involving less than 4,000 ac-ft/yr and less than 5.5 cfs, however, an environmental impact statement would be required only in the discretion of DNRC under its Montana Environmental Policy Act (MEPA) rules and whenever the cumulative effect of several small applications caused a significant environmental impact.

Water would be leased for terms not to exceed 50 years, although the term could be renewed. DNRC could require that 25 percent of project capacity be set aside for municipal and rural purposes (upon payment by the municipal or rural government entity of the costs of tie-in). Any other terms or conditions would be determined by DNRC through negotiations.

Concern has been raised about the application of a water leasing program to preferred uses such as agriculture. Data provided by DNRC indicate that only two agricultural appropriators since 1973 applied for



consumptive diversions in excess of 4000 ac-ft/yr. One of these was not developed.<sup>259</sup>

Table 19 sets forth the circumstances under which leased water might move out-of-basin or out-of-state under the proposed state water leasing program.

Proposed language:

[See Section 14 of the bill]

6. Use of water leasing proceeds

Recommendation:

The committee recommends that proceeds from a water leasing program should be used to develop a sound water policy and water development program in Montana. Some possible uses of water leasing proceeds that were suggested by the committee are as follows:

- (a) all proceeds paid into the general fund;
- (b) to administer a water leasing program;
- (c) to support the water courts in their adjudication of water rights;
- (d) to be deposited in the water development earmarked account within the earmarked revenue fund established in MCA 17-2-102;
- (e) to provide a centralized water resource data management system as described in this committee's recommendations;
- (f) to provide technical and financial assistance to applicants for water reservations and to perfect existing water reservations in the Yellowstone River Basin;
- (g) to repair and restore existing state-owned dams as required for safety reasons and/or to expand their beneficial use;
- (h) to provide for development of water projects including off-stream storage sites that are necessary to meet existing and future water demands;
- (i) to repair and restore existing municipal water supply systems;
- (j) to provide installation of rural water supply systems in areas of critical need;

(k) to develop an inventory and classification of the state's groundwater resources;

(l) to provide expenses and administrative costs of a water policy committee as recommended by the Select Committee on Water Marketing;

(m) to purchase public access sites for recreational use of streams and lakes;

(n) to fund water conservation measures;

(o) to fund research on improved irrigation systems and water conservation measures especially suitable for Montana;

(p) to complete soil surveys and mapping of the state and the identification of land areas suitable for irrigation; and

(q) to further efforts to prepare for interstate litigation and negotiations.

#### 7. Acquisition of water from federal reservoirs

##### Recommendation:

The committee recommends that the DNRC be granted continued authority to acquire water from all federal reservoirs in the state (as is now the policy under the temporary two-year modification to this section). The committee recommends that the department's authority be clarified to allow acquisition for "any beneficial use."

The existing agreement with the Bureau of Reclamation for the state's acquisition of water from Fort Peck limits the acquisition to industrial water. Under the current agreement the Bureau could sell large amounts of water for nonindustrial purposes and avoid sharing revenues with the state. The committee strongly urges that this agreement be renegotiated, and all future agreements be negotiated to cover water for any beneficial use.

##### Proposed language:

[See Section 15 of the bill]

C. Maximizing Montana's Fair Share of Missouri River Basin Water  
"Getting Montana's House in Order"

8. General stream adjudication

Recommendation:

The committee urges an expeditious and accurate completion of the statewide water adjudication process. The committee strongly urges that priority be given to prompt and accurate adjudication of the Missouri River Basin. The committee recommends that the Legislature support any justified funding request from the water courts.

Commentary:

The adjudication of pre-1973 water rights presently underway in the five water courts of the state is essential to protect future water needs in Montana. To date, three final decrees involving 10,715 claims have been entered; and 26 sub-basins, involving 46,726 claims, are predicted to be covered by preliminary decrees by the end of 1984.

Chief Water Judge W. W. Lessley has indicated that the adjudication process for the 200,000 plus claims that are now on file will be completed by 1990. To ensure the process is completed on schedule the Legislature should support the court's funding request.

9. Indian and federal reserved water rights

Recommendation:

The committee recommends support for legislation that would provide a two year extension of the Reserved Water Rights Compact Commission in its efforts to negotiate federal and Indian reserved water rights. The committee recommends that adequate funds be appropriated for the Reserved Water Rights Compact Commission to accomplish its goals.

Commentary:

The committee recognizes an urgency to conclude the equitable adjudication of Indian and federal reserved water rights. Unquantified reserved water right claims hamper the ability of the state to complete the statewide adjudication of water rights, interfere with water

resource planning, and limit the state's ability to prepare for interstate apportionment of the Missouri River.

In the event the Legislature chooses to renew the charter of the commission, the level of resources dedicated to the compact commission should be examined. The Legislature might encourage the development of joint water project proposals with Indian tribes as a means to satisfy both Indian claims and state needs.

#### 10. Water resources data management system

##### Recommendation:

The committee recommends the establishment within DNRC of a centralized water resources data management system. The system would make readily accessible to the state's policymakers necessary information on the state's water resources, existing and projected uses, and existing and projected demands. The committee also recommends that \$50,000 per year for each of the next five years be allocated for the development of such a system.

##### Commentary:

In the 1982 Trelease study done for DNRC, the authors found that:

"In order to make their specific decisions, each agency collects the necessary data which are stored in separate agency files and, in many cases, are difficult to relocate. At the present time much of the water resource data is fragmented, neither indexed nor inventoried, not recorded in a standard format, and most importantly, not readily accessible to those who need the information for making management decisions."

The study also reported that the state does not presently maintain data as to amount of water actually used by water claimants. Thus, the existing method reports maximum legal use rather than actual diversion.

The Trelease study suggested that centralized information is needed on the state's water resources, existing uses, and the potential for future development. As previously stressed in the present report, "the identification of existing uses and future development potential is



Montana's only line of defense to obtain a fair share in any interstate allocation." Specifically, the Trelease report suggested a centralized water resources data system should have five objectives: (1) to inventory and index the location of all pertinent water resource data; (2) to assess the accuracy and completeness of existing data (remove all duplication); (3) to standardize data collection procedures; (4) to develop and implement a centralized data system that is easily accessible in a useable format to all users; and (5) to establish a continuous and integrated water resource data collection and management program. To meet this need, the Trelease report recommended the allocation of \$50,000 per year for the next five years for the development of such a centralized water resources data system.

Such a data system is important both to current Montana users and potential users, as well as to the state as it develops interstate water policy. The committee is concerned, however, about relying entirely on one data system to report on present and future supply and demand. The Legislature may well wish for its Water Policy Committee, recommendation 14, to undertake verification of water resource data maintained by DNRC. The purpose of the verification would not be to duplicate functions already performed by the agency but to challenge or confirm the methodological assumptions and to systematically spot-check the data. The function would go a long way in raising the level of confidence of Montana policymakers, including the Legislature and the department itself, in the water resource data that they utilize in determining their long-term water policy.

Proposed language:

[See Section 18 of the bill]

11. Water reservation system

Recommendation:

The committee recommends an aggressive use of the water reservation system as provided in MCA § 85-2-316 to plan for and set aside water for

the anticipated future needs of the state. To accomplish the reservation of waters, the committee further recommends the following:

(1) The Legislature should encourage the water reservation process by appropriating sufficient funds for technical and financial assistance to the appropriate state agencies and other political subdivisions that are authorized to reserve water.

(2) The Legislature should appropriate funds to increase the monitoring and review of existing water reservations in the Yellowstone River Basin to ensure that progress is made in perfecting these reservations.

(3) The Legislature should mandate and fund an expedited reservation process for the Missouri River Basin.

(4) Reserved waters should be exempt from the leasing program.

(5) Reservations for use of water out-of-state should be evaluated against public interest criteria based on the New Mexico statute (see Section 2).

Commentary:

Accurate predictions of future water needs are important both to water resource management within the state and in preparation for negotiations or litigation with other states. Such information is also essential in dealing with Congress concerning water project funding and other issues, such as a Congressional apportionment of the Missouri.

Montana's innovative water reservation system is a systematic means to identify future uses in a basin. While reservations operate like permits in that they are protected in most cases from subsequent appropriations within the state, they may not be recognized as inchoate permits in an interstate apportionment action. But to the extent the reservation process represents a well-conceived attempt by Montana to manage and plan for the necessary future uses of its water, established reservations should be persuasive to the courts and Congress.

Reservations have been completed in the Yellowstone River Basin but the committee recognizes an urgent need to proceed with the reservation process on other major river basins. Because of downstream states'

interests in the Missouri River Basin, the committee has recommended special attention be given to water reservations in this basin.

There are uncertainties regarding some water rights in the Upper Missouri River Basin but the committee urges that the planning and technical efforts required for water reservations be initiated.

The successful development of water reservations in the Missouri River Basin will require sufficient financing and technical expertise to assist state and local government entities in initiating and completing the process.

The 1982 Trelease study done for the DNRC stated:

"It is critically important that the water reserved under the Yellowstone reservation process be developed within a reasonable time frame and that the reservants adhere to the schedule stipulated by the Board of Natural Resources and Conservation in the Reservation Order. This process must be able to withstand an equitable apportionment lawsuit among the Missouri Basin states. The Montana legislature realized this and allocated funds for administrative and technical assistance to the Yellowstone conservation districts in developing their reservations. The state should continue to closely monitor the development of these reservations to assure compliance with the Board reservation order."

The committee agrees with the Trelease recommendation and urges the Legislature to provide funding for additional technical and financial assistance to assure perfection of the Yellowstone reservations.

Table 19 sets forth the circumstances under which reserved water might move out-of-state under the committee's proposal.

Proposed language:

[See Sections 16 and 17 of the bill]

12. State water plan

Recommendation:

The committee strongly urges DNRC to comply with the provisions of MCA § 85-1-203 which requires the preparation of a state water plan, its

approval by the Board of Natural Resources and Conservation, and its submission to each general session of the Legislature. Also, the committee urges state officials and the state's Congressional delegation to pursue federal policies consistent with and in furtherance of the state water plan.

Commentary:

Section 85-1-203, MCA, which was originally passed in 1967 and revised in 1974, requires that the DNRC formulate, and, with the approval of the Board, adopt "a comprehensive, coordinated, multiple-use water resources plan" for the state. The plan, which can be formulated and approved in sections, is required to set forth "a progressive program for the conservation, development, and utilization of the state's water resources and to propose the most effective means by which these water resources may be applied for the benefit of the people." The section requires that the plan be adopted only after properly noticed public hearings. Additionally, the plan must be submitted to each general session of the Legislature.

While DNRC has undertaken many specific water studies in the state, it is unclear whether those are considered by the department as being the state water plan. There have been no public hearings advertised in accordance with the statute. The Board has not approved any document or set of documents or component of the plan. Most importantly, no such plan has been submitted to the Legislature in preceding sessions. Although DNRC has given indications that such a "plan" will be submitted to the 1985 Legislature, whether it will have been scrutinized through the required public hearings is unclear. Thus, if the plain language of section 85-1-203 is applied, Montana does not have a state water plan.

Compliance with section 85-1-203 is no mere procedural nicety. It is an indispensable prerequisite for demonstrating, in any interstate apportionment action, that Montana has systematically and thoughtfully planned for its water future. The state is vulnerable to the extent it does not comply with its own statutory requirements for the development of the state water plan. Montana's equities are improved in an



interstate setting if it develops a plan demonstrated as such and involving the public and the Legislature.

### 13. Water development

#### Recommendation:

The committee recommends continued funding and bonding capacity for the identification, development, and construction of water projects within the state. The Department of Natural Resources and Conservation should prioritize potential federal projects that would qualify under the Pick-Sloan Plan and report this listing to the Legislature each biennium. In addition to monitoring developments and issues that affect the state, Montana's existing Washington, D.C. staff, in conjunction with the state's Congressional delegation, should work toward the authorization and funding of such projects.

#### Commentary:

Putting water to use is important for buttressing Montana's claim to its fair share of Missouri Basin water, and water development is important for putting the water to use.

While DNRC has pursued federal funding on projects such as on the Milk River, more could be done to see authorization or funding for water development projects which would qualify under the Pick-Sloan Plan. In the proposed amendments, the committee seeks to require DNRC, as a part of its biennial report to the legislature, to identify such potential projects and specify the efforts it will undertake to secure this authorization and funding. Also, the committee urges Montana's Washington, D.C. office and Congressional delegation to support these efforts.

#### Proposed language:

[See Section 20 of the bill]

### 14. Water policy committee

#### Recommendations:

The committee recommends the creation of a permanent legislative water policy committee to advise the Legislature, in an ongoing manner,

on water policy and issues of importance to the state.

Commentary:

Water is a resource particularly important to the future of Montana. Policies concerning water must not be made in a vacuum. Coordinated and well-reasoned policies must be developed with the participation of the Legislature, other involved agencies, and the public. In exercising its role in appropriating money or approving compacts, the Legislature must understand the context of such actions and must accept them as integral parts of an overall state water strategy. Likewise, other agencies must be able to express their concerns about proposed policies and be able to express their concerns about proposed policies and be able to coordinate their own actions. Finally, the general public must understand the rationale for water policies so as to be supportive; and many citizens have valuable expertise to render in the development of water policy. These concerns argue for the creation of a permanent committee devoted to monitoring Montana's water policy.

During the next biennium, particularly important issues for discussion by such a committee could include:

- o constraints on consumptive use and water development brought about by extensive hydropower reservations in both the Missouri and Yellowstone basins;
- o oversight of the quantification of pre-1973, Indian, and federal reserved water rights;
- o the adequacy of the state's water resources data system, including the consideration of the adequacy of water research currently underway in state agencies and institutions, in meeting state policy and management needs;
- o the content of the state water plan and water development plan; and/or
- o the status of the state water reservation program.

The committee could be of particular value in developing communications with similar bodies in other Missouri Basin states.

Proposed language:

[See Section 21 of the bill]

15. Preparation for negotiations and possible litigation

Recommendation:

The committee recommends that Montana prepare for negotiations and potential litigation with other Missouri River Basin states. Such preparation might include:

(a) the establishment of a litigation contingency fund for the office of the attorney general;

(b) the development of a clear understanding between the Attorney General's office and DNRC as to their respective responsibilities for preparing for litigation and negotiations;

(c) the development of Montana's legal, economic, and equitable arguments in support of the apportionment of Missouri River water contained in the O'Mahoney-Milliken Amendment;

(d) the requirement that DNRC and, perhaps, the Attorney General's office submit annually to the Water Policy Committee and biannually to the Legislature a detailed report concerning Montana's strategy for interbasin litigation and negotiations; this report would also review the steps being undertaken in preparation for litigation and negotiation; the departments would be authorized to submit all or part of this report in confidence to the committee and Legislature if public disclosure would jeopardize litigation or negotiation strategies;

(e) the monitoring of federal and regional activities which affect Montana's water interests (especially water project funding and coal slurry legislation);

(f) intensive modeling of the interests and anticipated water strategies of other basin states; perhaps DNRC should be requested to

undertake a detailed and systematic examination of compact experiences elsewhere in the United States and Canada; such an examination would include identifying contentious issues and how they were resolved, studying negotiation strategies and pitfalls, and applying the lessons of these experiences to Montana's situation;

(g) perhaps an interagency litigation and/or negotiation task force needs to be established to expedite preparations; a liaison from the legislative water policy committee also might be desirable; and

(h) perhaps issues remaining outstanding from the execution of the Yellowstone River Compact shall be resolved.

The committee recommends that money be appropriated to support these efforts.

Commentary:

Montana needs to have a thoughtful strategy regarding its relationship with other states in the Missouri River Basin. This strategy must encompass what policies Montana wishes to work for in the basin, as well as what posture Montana will take in relation to the actions of the other basin states. This strategy requires preparation for both litigation and negotiation.

While nonjudicial conflict resolution is preferable in most instances, it is inevitable that the State of Montana will have to engage in some litigation concerning Missouri Basin water issues. The Attorney General's office and DNRC must be prepared for the inevitability of such litigation. The Trelease report recommended several measures to prepare the state: a contingency fund for litigation; further development of Montana's position based on the O'Mahoney-Milliken Amendment; monitoring federal and regional development; and, modeling other states' interests and strategies.

Even though there is growing interest in the negotiation of an interstate compact to apportion the waters of the Missouri River among the basin states, some observers believe that none of the states are ready for a compact. As for Montana, the Trelease report suggests that there is the preliminary need to resolve some of the unresolved issues



remaining from the execution of the Yellowstone River Compact among Montana, Wyoming, and North Dakota.

16. Efforts toward conflict resolution in the Missouri River Basin  
Recommendation:

The committee recommends that efforts toward reducing conflict among the states of the Missouri River Basin be given high priority by Montana. One result might be an interstate compact although many issues may be resolved by less formal means. The DNRC should be the lead negotiating agent for the state, but the legislative water policy committee (proposed in recommendation 14) should meet with and engage in discussions with similar legislative groups from other basin states. Montana should host a conference or other appropriate gathering of legislators and executive branch personnel from other basin states as one means to further discussions. Also, Montana should pay its dues to the Missouri Basin States Association.

Commentary:

It is predictable that the waters of the Missouri River Basin will eventually be allocated among the ten member states in the basin. That apportionment could come about through litigation, Congressional action, or interstate compacting.

The provisions of the O'Mahoney-Milliken Amendment, which give the state preference with consumptive uses over the navigation uses downstream, would be to Montana's advantage in litigation. Yet, as the lower states develop (probably at a rate faster than Montana), they will be putting water to use for municipal and industrial purposes - uses not automatically subordinated under the O'Mahoney-Milliken Amendment. As the water is put to use, the equities shift to the lower basin; and the U.S. Supreme Court, in an equitable apportionment criteria, is reluctant to reduce existing uses. Also, lower basin states may have the political clout to modify the Amendment; and, since they benefit from water not put to use upstream, they have a political incentive not to support upstream water development.

To protect its future claims to water, Montana might, on the one hand, undertake rapid water development or, on the other hand, rely on water planning and the water reservation process. But water development, though effective in making claim to the water, is expensive; and water planning and reservations, though relatively inexpensive, are of somewhat unknown value in interstate litigation.

Through effective communication with other basin states, conflicts can be resolved. Interstate compacting, in particular, offers an appealing alternative. Once executed, a compact can provide certainty in terms of present and future water entitlements. A well-written compact negates adverse judicial action and, once ratified by Congress, places the interstate settlement in most instances beyond the subsequent reaches of Congress. Expensive water development need not be undertaken solely to establish water rights.

Yet, compacts do not solve everything. Many issues, such as Indian water rights, are typically not covered by such agreements. Also, in undertaking negotiations, states must be well prepared as to data covering the resource and their own present and future needs and expectations. Successful compacting requires a high level of commitment by each of the individual states.

So long as the state's negotiators are well prepared, Montana has little to lose and much to gain by actively pursuing a compact among the states in the basin.

#### D. Miscellaneous Provisions

##### 17. Miscellaneous provisions

##### Recommendation:

The committee recommends the passage of certain technical provisions in addition to the substantive provisions set forth in the foregoing.

##### Proposed language:

[See Sections 22-29 of the bill]

## FOOTNOTES

- 1 1983 Mont. Laws ch. 706.
- 2 458 U.S. 941 (1982).
- 3 NEB. REV. STAT. § 46-613.01 (1978).
- 4 On May 3, 1984, the U.S. District Court ruled that the U.S. Department of Interior lacked statutory authority to execute the contract allowing South Dakota to consummate the sale. *Missouri v. Andrews*, 586 F. Supp. 1268 (1984). Although the decision was appealed to the Eighth Circuit Court of Appeals, No. 84-1674-NE, ETSI announced its abandonment of the project in August 1984.
- 5 H.B. 709, 47th Leg. (1983) (Appropriations bill).
- 6 Great Falls Tribune, Jan. 9, 1983, at, col. 3.
- 7 Speech by Leo Berry, Montana Environmental Quality Council Workshop (Jan. 11, 1983).
- 8 Id.
- 9 Speech by Prof. Albert Stone, Montana Environmental Quality Council Workshop (Jan. 11, 1983).
- 10 Id.
- 11 Id.
- 12 1983 Mont. Laws ch. 706, § 1, codified at MONT CODE ANN. § 85-1-205 (temporary) (1983).
- 13 1983 Mont. Laws ch. 706, § 3.
- 14 1983 Mont. Laws ch. 706, § 2, codified at MONT CODE ANN. § 85-2-311 (temporary) (1983).
- 15 1983 Mont. Laws ch. 706, § 4(2).
- 16 Presentation of Gary Fritz, Administrator, Water Resources Division, Montana Department of Natural Resources and Conservation, before the Montana Select Committee on Water Marketing (May 5, 1984).
- 17 See generally MONTANA DEPARTMENT NATURAL RESOURCES AND CONSERVATION, 1 FRAMEWORK REPORT (Oct. 1, 1976); PACIFIC N.W. RIVER BASINS COMM'N, 3 WATER TODAY AND TOMORROW: THE STATES (Jun. 1979).

- 18 PACIFIC N.W. RIVER BASINS COMM'N, 1 and 3 WATER TODAY AND TOMORROW (Jun. 1979); MONTANA DEPARTMENT NATURAL RESOURCES AND CONSERVATION, WATER RESOURCES ASSESSMENT PROJECT (Aug. 1981).
- 19 PACIFIC N.W. RIVER BASINS COMM'N, supra note 17.
- 20 MONT. CODE ANN. § 85-20-101 et seq. (1983).
- 21 See generally MO. BASIN STATES ASS'N, MISSOURI RIVER BASIN HYDROLOGY STUDY FINAL REPORT (May 1983); MONTANA DEPARTMENT NATURAL RESOURCES AND CONSERVATION, WATER RESERVATIONS AND AVAILABILITY IN THE YELLOWSTONE RIVER BASIN (May 1982); MO. RIVER BASIN COMM'N, UPPER MISSOURI RIVER BASIN LEVEL B STUDY REPORT AND ENVIRONMENTAL IMPACT STATEMENT (Mar. 1981); MO. RIVER BASIN COMM'N, 1 YELLOWSTONE RIVER BASIN AND ADJACENT COAL AREA LEVEL B STUDY (Nov. 1978); U.S. DEPARTMENT AGRICULTURE AND MONTANA DEPARTMENT NATURAL RESOURCES AND CONSERVATION, CLARK FORK OF THE COLUMBIA RIVER BASIN (1977); Montana Department Natural Resources and Conservation, Montana Water Use (1984) (unpublished).
- 22 Presentation of Gary Fritz, Administrator, Water Resources Division, Montana Department Natural Resources and Conservation, before the Montana Select Committee on Water Marketing (Dec. 2, 1983).
- 23 Pub. L. No. 534, 58 Stat. 665 (codified as amended in scattered sections of 16 U.S.C., 33 U.S.C. and 43 U.S.C.).
- 24 MONTANA DEPARTMENT NATURAL RESOURCES AND CONSERVATION, A WATER PROTECTION STRATEGY FOR MONTANA at 11-25 (Sep. 1982) [hereinafter cited as "TRELEASE"].
- 25 Montana Department Natural Resources and Conservation, Montana Water Use (1984) (unpublished).
- 26 MONT. CODE ANN. § 85-2-102 (1983).
- 27 Id. at 85-2-316 (1983).
- 28 16 U.S.C. § 1271 et seq. (1976).
- 29 See MONT. CODE ANN. § 2-15-212 (1983).
- 30 Wasp, Slurry Pipelines, 249 SCIENTIFIC AMERICAN (Nov. 1983); Santhanames et al., Nonwater Slurry Lines Considered, OIL AND GAS J. 128-40 (Jun. 23, 1980); U.S. OFFICE OF TECH. ASSESSMENT, A TECHNOLOGY ASSESSMENT OF COAL SLURRY PIPELINES (Sep. 1980).
- 31 1983 Mont. Laws ch. 706, § 4(c).



- 32 ECO NORTHWEST, FINANCIAL AND ECONOMIC FEASIBILITY OF PROPOSED ALTERNATIVES FOR TONGUE RIVER DAM CONSTRUCTION (Jan. 1, 1984) (prepared for Montana Department Natural Resources and Conservation)
- 33 S.267 and H.R. 1010, 98th Cong., 1st Sess. (1983).
- 34 Missouri Basin States Association Director's News Bulletin, Aug. 6, 1984, at C-1; see also note 4, supra.
- 35 U. S. DEPARTMENT OF INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT ON ENERGY TRANSPORTATION SYSTEM, INC. COAL SLURRY PIPELINE TRANSPORTATION PROJECT (2 vol. Jul. 1981).
- 36 U. S. OFFICE OF TECHNOLOGY ASSESSMENT, supra note 30.
- 37 ECO NORTHWEST, supra note 32.
- 38 See generally references cited in notes 18, 21 and 24, supra.
- 39 Id.
- 40 MONT. CODE ANN. § 85-2-211 et seq. (1983).
- 41 Id. at § 2-15-212 (1983); see also id. at § 85-2-701 to -704 (1982).
- 42 Water availability and management issues were discussed during Select Committee on Water Marketing meetings on Dec. 2, 1983, by Joe Marcotte, Regional Director, U.S. BLM, Billings, Mont.; Duane Sveum, U.S. Army Corps of Engineers, Missouri River Div., Omaha, Neb.; Carroll Hamon, Ex. Dir., Mo. River Basin States Assn., Omaha, Neb.; and Gary Fritz, Administrator, Water Resources Div., Mont. Department Natural Resources and Conservation, Helena, Montana.
- 43 U.S. DEPARTMENT OF INTERIOR, BUR. OF RECLAMATION, WATER FOR ENERGY: MISSOURI RIVER RESERVOIRS FINAL ENVIRONMENTAL IMPACT STATEMENT (no. 77-43, Dec. 1, 1977).
- 44 Contract between Bur. of Reclamation, U.S. Department of Interior and Montana Department Natural Resources and Conservation to permit water service for industrial use (no. 14-06-600-2040A).
- 45 U.S. DEPARTMENT OF INTERIOR, BUR. OF RECLAMATION, INDUSTRIAL WATER SERVICE: YELLOWTAIL (BIGHORN) AND BOYSEN RESERVOIRS (Aug. 26, 1983).
- 46 1983 Mont. Laws ch. 706, § 1, codified at MONT. CODE ANN. § 85-1-205 (1983).
- 47 1984 U.S. Bureau of the Census, U.S. Statistical Abstracts, Tables 13 and 14.

- 48 ARIZ. REV. STAT. ANN § 45-401 et se. (1982).
- 49 M. Frank et al., Economics of Water Marketing Options for Montana,  
at 11 (Sep. 1984) (report prepared for, and available from, Montana  
Select Committee on Water Marketing).
- 50 458 U.S. 941 (1982).
- 51 NEB. REV. STAT. § 46-613.01 (1978).
- 52 Id.
- 53 208 Neb. 703, 305 N.W.2d 614 (1981).
- 54 458 U.S. at 956.
- 55 Id. at 958.
- 56 NEB. REV. STAT. § 46-613.01 (Supp. 1983)
- 57 563 F. Supp. 379 (D.N.M. 1983).
- 58 N.M. STAT. ANN. § 72-12-19(1978), repealed by 1983 N.M. Laws ch. 2,  
§ 7.
- 59 1983 N.M. Laws ch. 2, codified at N.M. STAT. ANN. § 72-12-3 (Cum.  
Supp. 1984).
- 60 597 F. Supp. 694 (D.N.M. 1984).
- 61 G. Bonem and F. Brown, Some Remarks on the Role of Markets in  
Managing Western Water, at 7 (Jul. 14, 1984) (report prepared for, and  
available from, the Montana Select Committee on Water Marketing).
- 62 33 Cal.3d 419, 189 Cal.Rptr. 346, 658 P.2d 709, cert. denied, \_\_\_\_  
U.S. , 104 S.Ct.413, 78L.Ed.2d 351 (1983).
- 63 See, e.g., Rossmann, Public Trust in Appropriated Waters:  
California Supreme Court Decides Mono Lake Case, WNRL COMMENTARY 13  
(Spring 1983).
- 64 See, e.g., speech by Leo Berry, Montana Environmental Quality  
Council Workshop (Jan. 11, 1983).
- 65 H.B. 709, 47th Leg. (Appropriations bill).
- 66 TRELEASE at VII-26.
- 67 TRELEASE at 1-30.
- 68 TRELEASE at VII-16 to -29.

- 69    Mont., 682 P.2d 163 (May 15, 1984).
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- 111 As contrasted with the riparian systems adopted in the eastern states and the "hybrid" systems adopted in California, Oregon, Washington, and seven other states.
- 112 Codified at MONT. CODE ANN. § 85-2-101 et seq. (1983).
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APPENDIX A: LIST OF PRESENTERS AND WITNESSES  
AT COMMITTEE MEETINGS, SEMINARS, AND HEARINGS

AUGUST 4, 1983

Gene Chapel, Montana Farm Bureau  
Stephen Maly, 49th Parallel Institute  
James T. Mular, Brotherhood of Railway and Airline Clerks  
James Mockler, Montana Coal Council  
Susan Cottingham, Montana Environmental Information Center  
K. M. Kelly, Montana Water Development Association  
Larry Dodge, Helmville, MT  
Toni Kelley, Northern Plains Resource Council  
Howard Peavey, Water Resources Research Center  
Vernon Westlake, Agricultural Preservation Association  
Willa Hall, Montana League of Women Voters

OCTOBER 1, 1983

Don MacIntyre, Legal Counsel, DNRC  
Sharon Morrison, Attorney, Helena, MT  
Ted Doney, Attorney, Helena, MT  
Richard Aldrich, U.S. Department of the Interior, Billings, MT  
Peter Stanley, Counsel for the Reserved Water Rights Compact Commission  
Will Knedlik, Lincoln Institute of Land Policy  
John Thorson, Western Conference of the Council of State Governments  
Steve Maly, 49th Parallel Institute

DECEMBER 2, 1983

Joe Marcotte, Regional Director, Bureau of Reclamation  
Duane Sveum, U.S. Army Corps of Engineers  
Carroll Hamon, Missouri Basin States Association  
Gary Fritz, Water Resources Division, DNRC  
Dan Boggs, Blackfeet Tribes  
Larry Dodge, Helmville, MT  
Rep. Bernie Swift, District 91, Hamilton, MT

JANUARY 6 AND 7, 1984 - LEGAL SEMINAR

John Thorson, Western Conference of the Council of State Governments  
Peter Stanley, Counsel for the Reserved Water Rights Compact Commission  
Ted Doney, Attorney, Helena, MT  
Professor Al Stone, University of Montana Law School  
Richard Aldrich, U.S. Department of the Interior  
Don MacIntyre, Legal Counsel, DNRC  
Susan Cottingham, Montana Environmental Information Center  
Sharon Morrison, Attorney, Helena, MT  
Richard Moy, DNRC  
Senator Reed Marbut, Missoula, MT

MARCH 3, 1984

Robert Green, Miles City, MT  
Jim Flynn, Director, DFWP  
Dr. Bruce Finnie, ECO-Northwest  
Dr. John Anderson, Helena, MT  
John Delano, Montana Railroad Association  
Richard Moy, DNRC  
Larry Dodge, Helmville, MT

MAY 4, 1984

Verne House, Cooperative Extension Service, Montana State University  
Gary Fritz, Water Resources Division, DNRC  
Susan Cottingham, Montana Environmental Information Center  
Ted Doney, Attorney, Helena, MT  
John Thorson, Western Conference of the Council of State Governments

JULY 13 AND 14, 1984 - SEMINAR ON WATER POLICY MANAGEMENT OPTIONS

Gary Fritz, Water Resources Division, DNRC  
Gary D. Weatherford, Water Policy Consultant  
Mark D. O'Keefe, Water Policy Consultant  
Charles T. Dumars, University of New Mexico  
Karl J. Englund, Attorney, Missoula, MT  
John Thorson, Western Conference of the Council of State Governments  
Margery H. Brown, University of Montana Law School  
Bruce Finnie, ECO-Northwest  
Terry L. Anderson, Professor Economics, Montana State University  
Ronald B. Robie, Municipal Court Judge, Sacramento, CA  
F. Lee Brown, University of New Mexico  
Ted Doney, Attorney, Helena, MT  
James Goetz, Attorney, Bozeman, MT  
Steven Clyde, Attorney, Salt Lake City, UT

SEPTEMBER 20, 1984 - SIDNEY PUBLIC HEARING

Scott Ross, Walleyes Unlimited of Montana  
Manson Bailey, Valley County Development Council  
Walter Archer, Northern Plains Resource Council  
Molly Galusha, Northern Plains Resource Council  
Vera Henderson, Sidney, MT  
Robert Wilson, Sidney, MT  
John Garvin, Culbertson, MT  
Don Steinbeisser, Sidney, MT  
Jack Henderson, Sidney, MT  
Kinsey Irrigation Company



SEPTEMBER 24, 1984 - GREAT FALLS PUBLIC HEARING

Don Reed, Montana Environmental Information Center  
Mark Stermitz, Montana Environmental Information Center  
George N. Engler, Great Falls, MT  
Kevin Koumviada, Cascade, MT  
Warren Harding, Simms, MT  
George Roskie, Great Falls, MT

SEPTEMBER 26, 1984 - BOZEMAN PUBLIC HEARING

Arthur B. Coffin, Trout Unlimited  
Joe Gutkoski, Gallatin Wildlife Association  
Joel A. Shouse, Bozeman, MT  
Carroll Speck, Whitehall, MT  
Larry Dodge, Helmville, MT  
Dorothy Bradley, Bozeman, MT  
Vernon Westlake, Gallatin Agricultural Preservation Association  
Judge W.W. Lessley  
Jim Richard, Montana Wildlife Federation  
Don Skaar, Montana Chapter of the Sierra Club  
Bob Anderson, Greater Yellowstone Coalition

NOVEMBER 8 AND 9, 1984

Ted Doney, Attorney, Helena, MT  
Richard Moy, DNRC

DECEMBER 3, 1984

Ted Doney, Attorney, Helena, MT  
Gary Fritz, Water Resources Division, DNRC  
Rep. Hal Harper, Helena, MT

JANUARY 24, 1985

Larry Fasbender, Director, DNRC  
Gordon McOmber, Chairman, Reserved Water Rights Compact Commission  
Susan Cottingham, Helena, MT  
Gary Fritz, Water Resources Division, DNRC  
Marcia Rundle, Attorney, Reserved Water Rights Compact Commission  
Pat Graham, DFWP



## APPENDIX B: SUMMARY OF PUBLIC COMMENT

### 1. JO BRUNNER, WIFE, Power, MT

Advocates the orderly, systematic marketing of excess water with proceeds to be used to build and/or restore storage dams and facilities to improve water transportation. Supports providing for Montana's needs and protecting water for agriculture.

### 2. LARRY DODGE, Helmville, MT

Against the option of state water marketing. Supports removing the authority for use of eminent domain for coal slurry pipelines and for all other water projects. Supports modification of state Constitution to allow a free market of water rights.

### 3. BOB ANDERSON, Greater Yellowstone Coalition, Bozeman, MT

A. The reservation system created by the 1973 Water Use Act should be fully implemented in the headwater streams of the Missouri drainage.

B. Legislature should authorize funds necessary for technical studies by natural resource agencies, conservation districts and municipalities to complete reservation applications.

C. Legislature should authorize and fund an attempt to negotiate an interstate compact with downstream states.

D. Supports completion of adjudication process, completion of the implementation of the reservation system and settlement of both federal and Indian reserved claims.

E. Supports permanent use of public interest criteria in MCA §85-2-311 in place of anti export provisions of §85-1-121.

F. Supports lifting the coal slurry ban and placing coal slurry pipelines under the Major Facility Siting Act.

### 4. REP. BERNIE SWIFT, Hamilton, MT

A. Supports the aggressive continuation of water adjudication program with general fund dollars used to increase the personnel necessary for completion.

B. The Department of Natural Resources and Conservation should increase efforts on the inventory of suitable project sites for off stream storage and low head hydropower on the Missouri River Basin.

C. Supports the establishment of a committee or legislative interstate body with lower and upper Missouri River Basin states to determine apportionment of the Missouri River, including federal reservoirs.

D. Supports providing for sale and export of water with approval through the Environmental Planning Process (MEPA, MFSA) and final legislative approval.

E. Advocates continuation of the coal slurry ban.

F. Supports a continuation of the public interest criteria in MCA §85-2-311.

G. Advocates a strong eminent domain law and strong siting regulations on new coal transportation construction.

5. JOE GUTKOWSKI, Gallatin Wildlife Association, Bozeman, MT

Advocates accurate quantification of actual water use prior to 1973 and that water allocations to the beneficial users be in place statewide before water marketing is considered. Advocates proceeding with water reservations on the Missouri River and other river basins.

6. ARTHUR B. COFFIN, Trout Unlimited, Bozeman, MT

Advocates establishing water reservations on the Upper Missouri, Big Hole, Beaverhead, Madison, Gallatin and Jefferson rivers to protect and maintain instream flows. (Submitted document entitled Survey of the Economic Impact of Non-Resident Anglers in Montana 1982 Season)

7. JOEL A. SHOUSE, Bozeman, MT

Advocates initiation of the reservation process for the headwaters streams of the Missouri River including the Gallatin, Madison, and Jefferson rivers.

8. DOUGLAS E. MCCLELLAND, Madison-Gallatin Chapter of Trout Unlimited, Bozeman, MT

Advocates initiation of water reservation process in the upper Missouri River drainage especially to maintain necessary instream flows.

9. DUANE SCOTT, Whitehall, MT

Against water marketing, at least until water adjudication and reserved water right claims are finalized. Advocates water reservations on major rivers to maintain minimum instream flows.

10. JOHN H. DAILY, Broadus, MT

Against Wyoming's proposed dam on the Middle Fork of the Powder River because of the impact it may have on the quality of water needed for irrigation in Montana's Powder River drainage.

11. RON AND TWILA JO TALCOTT, Broadus, MT

Advocate a state water plan with adequate funding to maintain gauging stations to monitor water quality and stream flows. Advocate



completion of adjudication process. Advocate completion of water reservation process on the remaining river basins.

12. VERNON WESTLAKE, Gallatin Valley Agricultural Preservation Association, Bozeman, MT

A. The adjudication of the existing use of Montana water as required by SB 76 must be completed before a water marketing policy is enacted.

B. The majority of agricultural people believes that there is adequate legislation at this time to satisfy constitutional requirements for control of Montana water to the benefit of all Montana users.

13. PHILLIP DAVIS, Montana Environmental Information Center, Bozeman, MT

Advocates implementation of the water reservation process on the Clark Fork and upper Missouri rivers. Urges the committee to recommend funding for implementing the water reservation system. Advocates the Select Committee undertake to strengthen and improve the water adjudication process to achieve greater accuracy and completeness. Advocates continuation of the public interest criteria contained in ¶85-2-311.

14. FRANCIS J. WALCOTT, Absarokee, MT

A. The Select Committee report should not be limited to consideration of export and coal slurry.

B. The public interest criteria for obtaining water rights should be permanently adopted.

C. It would be desirable to place pipelines under the Major Facility Siting Act.

D. Congressional overruling of the Supreme Court decision in Sporhase v. Nebraska could be beneficial. Any measure considered should adequately protect Montana's right to manage and use its water. The state should monitor other states' activities and seek their strong support for any congressional efforts to modify the present law.

E. Montana should not market water because long term agricultural and recreational uses would not successfully compete with short term industrial interests. If a water marketing program were adopted, it must guarantee priority to present users during dry years including the instream reservations.

F. The committee report should extend to an assessment and recommendations for Montana's water policy for interstate waters.

G. Supports the six-point strategy of the Department of Natural Resources and Conservation for protection of the Missouri River Basin water except that water development and use be preceded by completion of the adjudication process and established water reservations on all major river basins in the state.

H. Montana should complete its reservation system first and then seek a legally established interstate apportionment of Missouri River Basin waters.

I. Against greater transferability of water rights, water marketing or taxing of water due to potential negative effects on agricultural uses and possible discrimination against some uses.

J. Supports establishing a permanent legislative committee with input from a citizens council and full opportunities for public participation.

15. ROBERT ORET, Hamilton, MT

A. Against a policy of selling water to protect the state's rights.

B. Advocates a water protection strategy based on the water reservation system such as is now in effect on the Yellowstone River.

C. Advocates appropriations by the legislature to allow implementing water reservations on the upper Missouri River and Clark Fork River.

D. Advocates permanent adoption of the public interest criteria and supports improving the water rights adjudication process.

16. ROBERT GREEN, Miles City, MT

A. Advocates funding for water quality monitoring and enforcement, especially in areas of coal or other resource development.

B. Supports negotiation of a Missouri Basin states compact as soon as possible, consistent with protection of Montana's future development.

C. Suggests a tax contract on large water use (10,000 acre feet/year) to generate some revenue and still insure protection for most existing users.

D. Suggests the following provisions for any large scale water uses of 10,000 acre feet/year or more:

- a. limited life contracts - maximum of 30 years;
- b. water quality must not be degraded;
- c. purchaser must have completed all permits including public interest criteria before contracts are signed and before construction is initiated;
- d. all water storage should be offstream storage, utilizing high flow during runoff;
- e. revenue from contracts should amortize costs to the state;
- f. water projects using more than 10,000 acre feet/year should be considered under the Major Facility Siting Act;
- g. contract water projects must not have the power of eminent domain;
- h. the ultimate proposed use of the water must be specified and non-negotiable.

E. Supports continuation of the coal slurry ban at least until other above named measures are completed.

- F. Against transfer of water rights.
- G. Supports the vigorous protection of the water reservation process and advocates its initiation on the Missouri River.
- H. Against a legislative committee for water study but may support a citizens council to study an acceptable water policy.

17. JEFFREY T. RENZ, Billings, MT

- A. Advocates continuation of the pre-existing anti export of water rule despite the holding of Sporhase.
- B. Rather than be concerned with a scheme to satisfy Sporhase, we should enact a scheme which satisfies Hudson County Water Company v. McCarter, 209 U.S. 349, 354 (1908) which upheld a New Jersey anti export provision.
- C. The coal slurry ban should be continued.
- D. The state should not attempt to legislatively overrule Sporhase.
- E. The Select Committee on Water Marketing should recommend a study commission for continued study and assessment of interstate waters. Until current and projected uses are established, Montana is not in a position to either negotiate or litigate apportionment issues.
- F. The legislature should enact a severance tax which burdens large users and benefits small users. This is to insure that water rights are not accumulated or "locked up" as water becomes scarce. A heavy tax ought to be imposed on industrial, municipal, and large agricultural users. Small water rights holders should be encouraged to retain, rather than transfer, their rights.

18. WILLA HALL, League of Women Voters, Helena, MT

- A. The League has supported the ban on export of water, but feels it is prudent to be able to control the sale of water should we be forced by judicial or congressional action. The public interest criteria are of utmost importance.
- B. Any water marketing proposal should address the issues listed by the committee but should stress the importance of:
  - a. a time limit with a clause permitting a cutoff if an emergency need for instream flows should occur;
  - b. provisions for minimum flow requirements to maintain the integrity of the rivers;
  - c. strict adherence to a public interest criteria.
- C. Advocates a thorough analysis of the needs of the total basin before establishing any water marketing policy.
- D. Urges the committee to recommend adequate financing for base data accumulation and technical assistance to individuals, agencies, and organizations to enable the development of reservations and water rights.
- E. The reservation system may be the most effective way to provide for future needs and instream flows. The League strongly supports minimum stream flow reservations.



F. There is a definite need for a continuing, permanent committee to study and monitor the development of Montana's water resources. Suggests that such a committee include legislators and interested citizens.

- G.
- a. several parts of the study required by HB 908 have not been adequately covered, named economic and environmental impacts;
  - b. the public interest criteria should be retained as a component of the permit process;
  - c. minimum stream flows should be established;
  - d. the streams in the western part of the state should not be ignored;
  - e. support a basinwide planning effort in the Missouri River Basin including the efforts of the Missouri River Basin States Association to resolve and avoid conflict;
  - f. urge the committee to consider alternative methods for financing water development projects in the state;
  - g. recommend that the committee submit preliminary recommendations to the 1985 legislature and continue the study to 1987.

H. Recommended that the committee hold workshops prior to the 1985 session.

19. DONALD SKAAR, Montana Chapter of the Sierra Club, Bozeman, MT

A. Advocates the use of the water reservation system to protect Montana's water and future options for that water as opposed to the "use it or lose it" approach. Urges the committee to recommend the water reservation system be encouraged in the Clark Fork and Missouri River drainages. Financial assistance should be made available to the agencies developing requests for these reservations.

B. The committee should recommend that the water reservation system be examined to find means for strengthening its legal status regarding interstate litigation.

C. Recommends a permanent legislative committee be established to study questions of water policy. The committee should include citizen group representatives chosen from water user groups. One of the committee's directives should be to investigate the opportunity to negotiate with downstream Missouri River Basin states.

D. Opposes water marketing and any mechanism that allows for water sales.

20. GEORGE N. ENGLER, Great Falls, MT

- A. Before considering water marketing the state should
- a. complete an inventory of water resources and obligations for each drainage;
  - b. work for and complete water reservations on the upper Missouri River and the Clark Fork;
  - c. consider only stored water for water marketing; no stream flows should be diverted for this purpose;



d. explore the possibility of leasing surplus water rather than out-right sales.

B. All water negotiations should be conducted in the open with respect for the public's right-to-know.

21. DON REED, Montana Environmental Information Center, Helena, MT

A. Opposes the "use it or lost it" water policy.

B. Opposes any water marketing scheme until after the water adjudication is completed. Urges the committee to support a thorough, accurate and defensible adjudication process including any changes in funding or structure of the process that may be deemed necessary.

C. Urges the encouragement of the water reservation process on the Clark Fork and the upper Missouri rivers.

D. Urges strong committee support for making the public interest criteria a permanent part of Montana's water law.

E. Advocates that all pipelines be governed by the Montana Major Facility Siting Act.

22. SCOTT ROSS, Walleyes Unlimited of Montana, Glasgow, MT

Urges that "any decisions that are made concerning water marketing plans, address the fact that a comprehensive water management policy needs to be developed with the integrity of our fisheries as one of the primary concerns." Water level management in reservoirs must consider the potential impacts on fishery resources.

23. WALTER ARCHER, Northern Plains Resource Council, Olive, MT

A. Advocates completion of the adjudication process.

B. Supports implementation of a water reservation system on the Missouri River.

C. Advocates continued funding for water monitoring stations throughout the Missouri River Basin.

D. Advocates discussions with downstream states through the Missouri River Basin States Association and negotiations with upstream states should be enacted by legislation if necessary.

E. All efforts necessary should be made to create a leasing contract system for any appropriator using 10,000 acre feet of water or more. (Testimony has a suggested procedure.)

F. The temporary (public interest) criteria enacted in HB 908 should be placed permanently in the statute.

G. All pipelines should be covered by the Major Facility Siting Act and eminent domain privileges restricted.

24. TOM GEORGE, Kinsey Irrigation Company, Kinsey, MT

A. Advocates a conference of all Missouri River Basin states for discussion and agreement on a management plan for the basin.

B. A commission should be established for management of the water in the Missouri River Basin. It should be comprised of representatives of all states and Indian nations within the basin. The commission should have the right to levy severance taxes on water; proceeds should be designated for preservation, distribution and conservation (of water). (A suggested scheme for determining who shall pay taxes is included in the testimony. The suggested rights and duties for a permanent Missouri River Basin Commission is provided in the testimony.)

C. Does not feel coal slurry pipelines create the economic competition necessary for prolonged economic investment.

D. Suggests a study of a fast water canal for transport of products from the headwaters to the nearest point of navigation on the Missouri River. The canal would also deliver irrigation water.

APPENDIX C: QUESTIONS THAT GUIDED COMMITTEE'S  
FINAL DELIBERATIONS

When the Select Committee on Water Marketing met on November 8 and 9, and December 3, 1984, to finalize its recommendations, its members chose from a variety of policy responses that have been presented over the last year and a half. As the organization of this report indicates, the policy options were selected from a spectrum starting with no or minor policy changes, on the one end, and ending with a comprehensive statement of state water policy, on the other.

This appendix sets forth the questions specifically considered by the committee as it formulated its final recommendations.

1. Does the Committee Choose Not to Act (Level 1 Response)?

a. In particular, does the committee desire that the pre-existing ban on the exportation of water from the State (MCA § 85-1-121) be revived?

b. Does the committee desire that the ban against coal slurry pipelines (MCA § 85-2-104) be retained?

c. Does the committee desire that the pre-existing criteria for the issuance of permits (MCA § 85-2-311) be revived?

d. Does the committee desire that the pre-existing limitation on the acquisition of water from federal reservoirs (MCA § 85-1-205) be revived (thereby limiting such acquisitions to Fork Peck Reservoir)?

e. If the committee does desire to return to pre-existing law in any of the above sections (a,c, or d), does the committee desire to re-enact the provisions of former law so as to avoid Chada-type problems

(i.e., violating separation of powers by denying the governor his constitutional role in the legislative process)?

2. Does the Committee Desire Only to Modify Existing Law in a Minor Fashion (Level 2 Response)?

a. Ban against the exportation of water:

(1) Does the committee desire to retain the public interest criteria (MCA § 85-2-311) that were enacted in 1983?

(2) Does the committee desire to make some modifications to the public interest criteria (MCA § 85-2-311), perhaps along the lines adopted by New Mexico (NM Stat. Ann. § 72-12B-1) or some other state?

(3) Does the committee suggest that DNRC should undertake rulemaking under MCA § 85-2-311 (so as to further define such concepts as "benefit to state")?

(4) In either case (1) or (2), does the committee desire to re-enact all of the provisions of MCA § 85-2-311 to avoid Chada-type problems?

b. Ban against the use of water for coal slurry:

(1) Does the committee desire to remove the ban against the use of water for coal slurry pipelines (MCA § 85-2-104), thereby making coal slurry a beneficial use of water?

(2) Does the committee desire to strengthen the coal slurry ban by incorporated limitations suggested by Sporhase v. Nebraska?

c. Other regulation of coal slurry pipelines:

(1) Does the committee desire to place coal slurry pipelines under the provisions of the Major Facility Siting Act (MCA § 75-20-101 et seq.), thereby defining such a pipeline as a "facility" under the Act [MCA § 75-20-104(10)(c)]?

(2) Does the committee desire to place all pipelines under the provisions of the Major Facility Siting Act?



(3) Does the committee desire to withdraw the eminent domain power from firms seeking to construct coal slurry pipelines (thereby amending MCA § 69-13-104)?

(4) Does the committee desire to withdraw the eminent domain power from all firms seeking to construct pipelines, regardless of type, within this state?

(5) Does the committee desire to regulate coal slurry pipelines in some other fashion?

3. Does the Committee Desire to Adopt a Water Marketing Program (Level 3 Response)?

a. Does the committee simply desire to authorize private parties to freely transfer their water rights with a minimum of state supervision?

b. Does the committee desire to adopt a limited or stand-by state water marketing scheme with a limited amount of water from federal and/or state reservoirs available for sale (with payment flowing to the state)?

c. Does the committee desire to adopt a comprehensive state water marketing program? Under such a program, the state might acquire in its own name all unappropriated surface and groundwater and require all potential users (perhaps exempting small users or certain types of uses) to purchase water from it?

d. In the event the committee desires to recommend a limited or comprehensive state water marketing program, what does the committee desire to recommend for each of the following characteristics of a marketing program:

(1) Who sells?

(a) DNRC or special state agency, trust, or special authority?

- (b) Do private parties also have the freedom to sell existing rights?
- (2) How much and from where?
  - (a) Impoundments v. free-flowing rivers and streams?
  - (b) Federal v. state reservoirs?
  - (c) Annual limitation?
- (3) What procedure?
  - (a) What criteria, if any, to evaluate sales proposals?
  - (b) What will be the price (fair market value or other)?
  - (c) How will water be sold (e.g., bilateral negotiations, bidding system)?
  - (d) Requirement of environmental impact statement?
  - (e) Large projects, such as pipelines, covered by Major Facility Siting Act?
  - (f) Legislative approval required?
- (4) What contract provisions?
  - (a) What interest is conveyed (e.g., fee, leasehold, permit)?
  - (b) What term of years?
  - (c) Can interest be transferred to someone else?
  - (d) What breach of contract provisions?
  - (e) In the case of large projects, such as pipelines, any mandatory set aside of water for the use of others?
- (5) How will the sales proceeds be distributed?
  - (a) Development of water marketing impoundments?
  - (b) General water development?
  - (c) Completion of water rights adjudications?
  - (d) Maintain or restore existing dams?
  - (e) Installation of hydro?
  - (f) Existing or new trust fund?
  - (g) General fund?
  - (e) Does the committee wish to recommend that DNRC negotiated a contract with the Bureau of Reclamation to cover all federal reservoirs in state and all types of water (not just industrial)?

4. Does the Committee Desire to Recommend Certain Measures Designed to Maximize Montana's Fair Share of Missouri River Basin Water (Level 4 Response)?

a. "Getting our own house in order:"

(1) Does the committee desire to recommend acceleration of or greater thoroughness in the statewide general stream adjudications? If so, should

(a) Additional resources be appropriated to support the adjudications? (e.g., more personnel for verification of water claims)?

(b) A mandatory date for completion of the adjudications be imposed?

(c) A moratorium on any permits and/or sales of water until the general adjudications are completed?

(2) Does the committee desire to recommend acceleration of the quantification of federal and Indian reserved rights?

(a) If so, should acceleration be achieved through reauthorization of the Reserved Rights Compact Commission?

(b) Or should acceleration be achieved through the termination of the commission with federal and Indians thereby being adjudicated as a part of the statewide process?

(c) If the commission is to be continued, should it be restructured or receive additional resources?

(3) Does the committee desire to recommend the development of a centralized water resource management system?

(a) Does the committee recommend an appropriation for such a system (estimated at \$50,000 for each of 5 years)?

(b) Should the Legislature fund its own staff position for monitoring and validating water resource data?

(4) Does the committee desire to recommend the aggressive use of a reservation-type system to plan and set aside water for the state's

future anticipated uses (particularly in the Missouri River Basin)? If so, does the committee recommend:

- (a) Reliance on the existing reservation system?
- (b) Reliance on the existing reservation system with
  - (i) The appropriation of additional resources for technical and financial assistance?
  - (ii) A statutorily-mandated date for completion of the reservations?
  - (iii) Statutorily-mandated completion of reservations in certain basins?
  - (iv) A directive to DNRC to be an assertive, lead agency in completing the reservations?
  - (v) Funding for increased monitoring of the perfection of those already created reservations in the Yellowstone Basin?
- (a) Statutorily-creating a special reservation process, with adequate resources, for the Missouri (Trelease suggestion; estimated at \$600,000 over 5 years)?
- (b) Immediately appropriating in the state's name all unappropriated surface and groundwater to ensure maximum flexibility and control for the state in planning its water future (New Mexico suggestion)?

(5) Does the committee desire to make certain recommendations concerning the State Water Plan?

- (a) In spite of the plain language of MCA § 85-1-203, should the Legislature take additional steps to ensure the timely completion by DNRC of the State Water Plan and its periodic revisions?
- (b) Should the Legislature vest responsibility for developing the State Water Plan in some other entity (e.g., the Legislature or one of its committees, a commission or council)?

(6) Should the committee recommend increased emphasis on water development projects to establish Montana's claim to Missouri River water? If so, should the Legislature



- (a) Provide additional funding or bonding capacity for the identification, development, and funding of new projects?
  - (i) State projects?
  - (ii) Joint state/federal projects?
  - (iii) Joint state/Indian projects?
  - (iv) Private projects?
- (b) Request DNRC to prioritize potential federal projects that would qualify under the Pick-Sloan Plan?
- (c) Fund a lobbying activity in Washington, D.C., to secure authorization and funding of federal projects in Montana?
- (d) Should the source of new state monies for water development be:
  - (i) Proceeds from the marketing of water?
  - (ii) Increased use of coal severance tax receipts?
  - (iii) Proceeds from a severance tax on water?
  - (iv) Proceeds from fees imposed on the use of water?
  - (v) Proceeds from new hydroelectric generation capacity on federal and state dams within Montana (would require the appropriation of funds for hydroelectric installation)?
- (e) Require that the sponsorship of state projects also result in state ownership of the resulting water distribution systems (Judge Robie's suggestion)?

(7) Does the committee desire to recommend the imposition of taxes or user fees on water so as to encourage conservation in the use of the resource as well as to provide additional revenues for water development and other state programs?

- (a) If so, does the committee recommend:
  - (i) A tax on the extraction of water from the ground or from streambeds?
  - (ii) A fee on the first use of water in the state?
  - (iii) Exemptions for type of use (e.g., agricultural) or amount of use (e.g., small user exemption)?

- (b) What rate of tax or fee does the committee recommend?
- (c) What distribution of the proceeds does the committee recommend (e.g., water development fund, adjudications, general fund)?

(8) Does the committee desire to recommend the creation of some committee or other entity having responsibility for water policy in Montana?

- (a) If so, should the purpose of the committee or other entity be:
  - (i) To advise the governor and/or DNRC on water policy and issues?
  - (ii) To advise the Legislature on water policy and issues?
  - (iii) To monitor water issues both within and without the state?
  - (iv) To develop the water policies, including the Water Plan, of the state?
  - (v) To monitor and validate water resource data?
  - (vi) To prioritize and oversee water development activities?
  - (vii) To engage in negotiations with other states concerning shared water issues, including the drafting of an interstate compact?
- (b) Should such a committee or entity be:
  - (i) Appointed by, and answerable to, the governor and/or DNRC?
  - (ii) A standing or interim committee of the Legislature?
  - (iii) A permanent oversight committee of the Legislature?
  - (iv) A permanent subcommittee of the Environmental Quality Council?
  - (v) An independent or quasi-independent committee with legislative, executive, and lay representation with its own budget and staffed by the

## Environmental Quality Council?

b. What recommendations does the committee desire to make concerning Montana's interrelationships with other states concerning water?

(1) Does the committee recommend the appropriation of additional resources in preparation for negotiation or litigation with other states? If so, does the committee recommend:

- (a) The appropriation of \$200,000 or some other amount to the attorney general's office as a contingency fund for litigation?
- (b) The appropriation of funds to the attorney general's office and DNRC for further development of Montana's legal, economic and equitable arguments supported the apportionment contained in the 1944 Flood Control Act and the O'Mahoney-Milliken Amendment?
- (c) The appropriation of additional funds to the governor's office or DNRC for monitoring federal and regional activities which affect Montana's water interests (especially water project funding and coal slurry legislation)?
- (d) The appropriation of additional funds to DNRC so that the department might undertake intensive modeling of the interests and anticipated water strategies of other basin states?
- (e) The appropriation of additional funds to otherwise staff and support a negotiating team?

(2) Does the committee desire to recommend that negotiations for an interstate compact be given high priority for the state?

- (a) Should Montana pay its dues to the Missouri Basin States Association?
- (b) If so, should DNRC be the lead negotiating agent for the state?
- (c) Or should a special negotiator be retained?
- (d) Or should a special committee or other entity [such

as a committee or entity suggested under 4(a)(8)] be vested with negotiating responsibility?

(3) Should additional funds be allocated to the attorney general's office and the DNRC for prompt resolution of outstanding issues concerning the Yellowstone River Compact (Trelease estimate of \$200,000 over 4 years)?

(4) Does the committee recommend efforts seeking Congressional reversal of the U.S. Supreme Court's decision in Sporhase v. Nebraska?

- (a) If so, does the committee recommend a joint resolution addressed to Congress to that effect?
- (b) Does the committee recommend an appropriation for a Washington lobbying effort in support of Congressional reversal (as well as to monitor the water provisions of any coal slurry legislation)?



APPENDIX D:  
PROPOSED LEGISLATION

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APPENDIX D: PROPOSED LEGISLATION  
PART II: BILL (LC660)

1 \_\_\_\_\_ BILL NO. \_\_\_\_\_

2 INTRODUCED BY.

3 BY REQUEST OF THE SELECT COMMITTEE ON WATER MARKETING

4

5 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING STATE WATER  
6 POLICY TO MAXIMIZE MONTANA'S INTERESTS IN THE INTERSTATE  
7 ALLOCATION OF WATER; AMENDING CRITERIA FOR WATER  
8 APPROPRIATION AND CHANGES IN APPROPRIATION; PROVIDING FOR A  
9 LIMITED WATER LEASING PROGRAM; EXEMPTING WATER RESERVATIONS  
10 FROM THE LEASING PROGRAM; PLACING CERTAIN PIPELINES UNDER  
11 THE MONTANA MAJOR FACILITY SITING ACT; PROVIDING FOR WATER  
12 RESERVATIONS IN THE MISSOURI RIVER BASIN; ESTABLISHING A  
13 WATER RESOURCES DATA MANAGEMENT SYSTEM; CREATING A PERMANENT  
14 WATER POLICY COMMITTEE; REPEALING THE BAN ON THE USE OF  
15 WATER FOR COAL SLURRY; AMENDING SECTIONS 75-20-104,  
16 75-20-216, 75-20-218, 75-20-303, 75-20-304, 75-20-1202,  
17 85-1-203 THROUGH 85-1-205, 85-1-621, 85-2-102, 85-2-112,  
18 85-2-122, 85-2-124, 85-2-301, 85-2-311, 85-2-312, 85-2-316,  
19 85-2-402, MCA, AND SECTION 7, CHAPTER 706, LAWS OF 1983;  
20 REPEALING SECTION 85-2-104, MCA; AND PROVIDING AN EFFECTIVE  
21 DATE AND AN APPLICABILITY DATE."

22

23 WHEREAS, the Select Committee on Water Marketing was  
24 commissioned by the 1983 Legislature to undertake a study of  
25 the advantages and disadvantages of water marketing; and

1       WHEREAS, the Select Committee in completing its study  
2 determined that Montana needs to address broader questions  
3 of water policy in order to secure Montana's interests in  
4 allocation and management of state waters; and

5       WHEREAS, the Select Committee has presented a  
6 comprehensive package of recommendations that must be  
7 considered as a whole; and

8       WHEREAS, these recommendations serve to revise  
9 Montana's water policy in order to maximize Montana's  
10 authority over management of state waters and other natural  
11 resources and to conserve water for existing and future  
12 beneficial uses by Montanans.

13       THEREFORE, the Legislature of the State of Montana  
14 finds that this legislation and other recommendations of the  
15 Select Committee on Water Marketing constitute an  
16 appropriate revision of state water policy necessary to  
17 secure Montana's interests for present and future benefit to  
18 Montanans.

19  
20 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

21       Section 1. Section 85-2-102, MCA, is amended to read:  
22 "85-2-102. Definitions. Unless the context requires  
23 otherwise, in this chapter the following definitions apply:

24       (1) "Appropriate" means to divert, impound, or  
25 withdraw (including by stock for stock water) a quantity of



1 water or, in the case of a public agency, to reserve water  
2 in accordance with 85-2-316.

3 (2) "Beneficial use", unless otherwise provided,  
4 means:

5 (a) a use of water for the benefit of the  
6 appropriator, other persons, or the public, including but  
7 not limited to agricultural (including stock water),  
8 domestic, fish and wildlife, industrial, irrigation, mining,  
9 municipal, power, and recreational uses; and

10 (b) a use of water appropriated by the department for  
11 the state water leasing program under [section 14] and of  
12 water leased under a valid lease issued by the department  
13 under [section 14].

14 (3) "Board" means the board of natural resources and  
15 conservation provided for in 2-15-3302.

16 (4) "Certificate" means a certificate of water right  
17 issued by the department.

18 (5) "Change in appropriation right" means a change in  
19 the place of diversion, the place of use, the purpose of  
20 use, or the place of storage.

21 ~~†5†~~(6) "Declaration" means the declaration of an  
22 existing right filed with the department under section 8,  
23 Chapter 452, Laws of 1973.

24 ~~†6†~~(7) "Department" means the department of natural  
25 resources and conservation provided for in Title 2, chapter

1 15, part 33.

2 ~~(7)~~(8) "Existing right" means a right to the use of  
3 water which would be protected under the law as it existed  
4 prior to July 1, 1973.

5 ~~(8)~~(9) "Groundwater" means any water beneath the land  
6 surface or beneath the bed of a stream, lake, reservoir, or  
7 other body of surface water, and which is not a part of that  
8 surface water.

9 ~~(9)~~(10) "Permit" means the permit to appropriate issued  
10 by the department under 85-2-301 through 85-2-303 and  
11 85-2-306 through 85-2-314.

12 ~~(10)~~(11) "Person" means an individual, association,  
13 partnership, corporation, state agency, political  
14 subdivision, the United States or any agency thereof, or any  
15 other entity.

16 ~~(11)~~(12) "Political subdivision" means any county,  
17 incorporated city or town, public corporation, or district  
18 created pursuant to state law or other public body of the  
19 state empowered to appropriate water but not a private  
20 corporation, association, or group.

21 ~~(12)-"Slurry"-means-a-mixture-of--water--and--insoluble~~  
22 ~~material-~~

23 (13) "Waste" means the unreasonable loss of water  
24 through the design or negligent operation of an  
25 appropriation or water distribution facility or the

1 application of water to anything but a beneficial use.

2 (14) "Water" means all water of the state, surface and  
3 subsurface, regardless of its character or manner of  
4 occurrence, including but not limited to geothermal water,  
5 diffuse surface water, and sewage effluent.

6 (15) "Water division" means a drainage basin as defined  
7 in 3-7-102.

8 (16) "Water judge" means a judge as provided for in  
9 Title 3, chapter 7.

10 (17) "Water master" means a master as provided for in  
11 Title 3, chapter 7.

12 (18) "Well" means any artificial opening or excavation  
13 in the ground, however made, by which groundwater is sought  
14 or can be obtained or through which it flows under natural  
15 pressures or is artificially withdrawn."

16 Section 2. Section 85-1-204, MCA, is amended to read:

17 "85-1-204. Department powers over state waters. (1)  
18 The department, with the approval of the board, may sell,  
19 lease, and otherwise dispose of all waters which may be  
20 impounded under this chapter, and the water may be sold for  
21 the purpose of irrigation, development of power, watering of  
22 stock, or any other purpose. The department may also lease  
23 water under the state water leasing program established  
24 under the provisions of [section 14]. To the extent that it  
25 may be necessary to carry out this chapter and subject to a

1 compliance with the other provisions of this chapter, the  
2 department has full control of all the water of the state  
3 not under the exclusive control of the United States and not  
4 vested in private ownership, and it shall take such steps as  
5 may be necessary to appropriate and conserve the same for  
6 the use of the people. The authority of the department  
7 conferred by this chapter extends and applies to rights to  
8 the natural flow of the waters of this state which it may  
9 acquire, with the approval of the board, by condemnation,  
10 purchase, exchange, appropriation, or agreement.

11 (2) For the purpose of regulating the diversion of  
12 those waters, the department may enter upon the means and  
13 place of use of all appropriators for making surveys of  
14 respective rights and seasonal needs.

15 (3) The department may take into consideration the  
16 decrees of the courts of this state having jurisdiction  
17 which purport to adjudicate the waters of a stream or its  
18 tributaries, and a fair, reasonable, and equitable  
19 reconciliation shall be made between the claimants asserting  
20 rights under different decrees and between decreed rights  
21 and asserted rights of appropriation not adjudicated by any  
22 court.

23 (4) The department, at its discretion, may hold  
24 hearings relating to the rights of respective claimants  
25 after first giving such notice as it considers appropriate



1 and make findings of the date and quantity of appropriation  
2 and use of all claimants which the department will recognize  
3 and observe in diverting the waters which it owns. The  
4 department may police and distribute to the owner of the  
5 recognized appropriation the waters due him upon request and  
6 under terms agreed upon.

7 (5) The department, when engaged in controlling and  
8 dividing the natural flow of a stream under the authority  
9 granted by this chapter, is exercising a police power of the  
10 state, and water commissioners appointed by any court may  
11 not deprive the department of any of the waters owned or  
12 administered under agreement with respective owners. The  
13 owner of a prior right contending that the department is not  
14 recognizing and respecting the appropriation may resort to a  
15 court for the purpose of determining whether or not the  
16 rights of the claimant have been invaded, and the department  
17 shall observe the terms of the final decree.

18 (6) When the department impounds or acquires the right  
19 of appropriation of the waters of a stream it may divert or  
20 authorize the diversion at any point on the stream or any  
21 portion thereof when it is done without injury to a prior  
22 appropriator."

23 Section 3. Section 85-2-301, MCA, is amended to read:

24 "85-2-301. Right to appropriate. (1) After July 1,  
25 1973, a person may not appropriate water except as provided

1 in this chapter. A person may only appropriate water for a  
2 beneficial use.

3 (2) (a) Only the department may appropriate water by  
4 permit under 85-2-311 in either of the following instances:

5 (i) for transport outside the following river basins:

6 (A) the Clark Fork River and its tributaries to its  
7 confluence with Lake Pend Oreille in Idaho;

8 (B) the Kootenai River and its tributaries to its  
9 confluence with Kootenay Lake in British Columbia;

10 (C) the St. Mary River and its tributaries to its  
11 confluence with the Oldman River in Alberta;

12 (D) the Little Missouri River and its tributaries to  
13 its confluence with Lake Sakakawea in North Dakota;

14 (E) the Missouri River and its tributaries to its  
15 confluence with the Yellowstone River in North Dakota; and

16 (F) the Yellowstone River to its confluence with the  
17 Missouri River in North Dakota; or

18 (ii) whenever water in excess of 4,000 acre-feet a year  
19 and 5.5 cubic feet per second, for any use, is to be  
20 consumed.

21 (b) Water for these purposes or in these amounts may  
22 be leased from the department by any person under the  
23 provisions of [section 14].

24 (3) A right to appropriate water may not be acquired  
25 by any other method, including by adverse use, adverse

1 possession, prescription, or estoppel. The method prescribed  
2 by this chapter is exclusive."

3 Section 4. Section 85-2-311, MCA, is amended to read:

4 "85-2-311. Criteria for issuance of permit. (1) Except  
5 as provided in subsections (2) ~~and--(3)~~ through (4), the  
6 department shall issue a permit if the applicant proves by  
7 substantial credible evidence that the following criteria  
8 are met:

9 (a) there are unappropriated waters in the source of  
10 supply:

11 (i) at times when the water can be put to the use  
12 proposed by the applicant;

13 (ii) in the amount the applicant seeks to appropriate;  
14 and

15 (iii) throughout the period during which the applicant  
16 seeks to appropriate, the amount requested is available;

17 (b) the water rights of a prior appropriator will not  
18 be adversely affected;

19 (c) the proposed means of diversion, construction, and  
20 operation of the appropriation works are adequate;

21 (d) the proposed use of water is a beneficial use;

22 (e) the proposed use will not interfere unreasonably  
23 with other planned uses or developments for which a permit  
24 has been issued or for which water has been reserved.

25 (2) ~~(a)~~ The department may not issue a permit for an

1 appropriation of ~~10,000~~ 4,000 or more acre-feet of water a  
 2 year ~~or 15~~ and 5.5 or more cubic feet per second of water  
 3 unless ~~it affirmatively finds~~ the applicant proves by clear  
 4 and convincing evidence that:

5 ~~{i}~~(a) the criteria in subsection (1) are met;

6 ~~{ii}~~(b) ~~the applicant has proven by clear and~~  
 7 ~~convincing evidence that~~ the rights of a prior appropriator  
 8 will not be adversely affected;

9 ~~{iii}~~(c) the proposed appropriation is a reasonable  
 10 use. Such a finding shall be based on a consideration of the  
 11 following:

12 ~~{A}~~(i) the existing demands on the state water supply,  
 13 as well as projected demands such as reservations of water  
 14 for future beneficial purposes, including municipal water  
 15 supplies, irrigation systems, and minimum streamflows for  
 16 the protection of existing water rights and aquatic life;

17 ~~{B}~~(ii) the benefits to the applicant and the state;

18 ~~{E} the economic feasibility of the project;~~

19 ~~{D}~~(iii) the effects on the quantity, and quality, ~~and~~  
 20 ~~potability~~ of water for existing beneficial uses in the  
 21 source of supply;

22 (iv) the availability and feasibility of using  
 23 low-quality water for the purpose for which application has  
 24 been made;

25 ~~{E}~~(v) the effects on private property rights by any



1 creation of or contribution to 'saline seep; and

2 ~~{P}~~(vi) the probable significant adverse environmental  
3 impacts of the proposed use of water as determined by the  
4 department pursuant to Title 75, chapter 1, or Title 75,  
5 chapter 20.

6 ~~{b)--A-permit-for-an-appropriation-for-a-diversion--for~~  
7 ~~a--consumptive--use--of--10,000-or-more-acre-feet-of-water-a~~  
8 ~~year-or-15-or-more-cubic-feet-per-second-of-water-under-this~~  
9 ~~subsection-may-not-be-issued-unless-the-department-petitions~~  
10 ~~the-legislature-and-the-legislature-affirms-the-findings--of~~  
11 ~~the-department-~~

12 (3) (a) The state of Montana has long recognized the  
13 importance of conserving its public waters and the necessity  
14 to maintain adequate water supplies for the state's water  
15 requirements. Although the state of Montana also recognizes  
16 that, under appropriate conditions, the out-of-state  
17 transportation and use of its public waters are not in  
18 conflict with the public welfare of its citizens or the  
19 conservation of its waters, the criteria in this subsection  
20 (3) must be met before out-of-state use may occur.

21 (b) The department may not issue a permit for the  
22 appropriation of water for withdrawal and transportation for  
23 use outside the state unless the applicant proves by clear  
24 and convincing evidence that:

25 (i) depending on the volume of water diverted or

1 consumed, the applicable criteria and procedures of  
2 subsection (1) or (2) are met;

3 (ii) the proposed out-of-state use of water is not  
4 contrary to water conservation in Montana; and

5 (iii) the proposed out-of-state use of water is not  
6 otherwise detrimental to the public welfare of the citizens  
7 of Montana.

8 (c) In determining whether the applicant has proved by  
9 clear and convincing evidence that the requirements of  
10 subsections (3)(b)(ii) and (3)(b)(iii) are met, the  
11 department shall consider the following factors:

12 (i) whether there are present or projected water  
13 shortages within the state of Montana;

14 (ii) whether the water that is the subject of the  
15 application could feasibly be transported to alleviate water  
16 shortages within the state of Montana;

17 (iii) the supply and sources of water available to the  
18 applicant in the state where the applicant intends to use  
19 the water; and

20 (iv) the demands placed on the applicant's supply in  
21 the state where the applicant intends to use the water.

22 (d) When applying for a permit or a lease to withdraw  
23 and transport water for use outside the state, the applicant  
24 shall submit to and comply with the laws of the state of  
25 Montana governing the appropriation, lease, and use of

1 water.

2       ~~(3)~~(4) An appropriation, diversion, impoundment, use,  
3 restraint, or attempted appropriation, diversion,  
4 impoundment, use, or restraint contrary to the provisions of  
5 this section is ~~null-and-void~~ invalid. No officer, agent,  
6 agency, or employee of the state may knowingly permit, aid,  
7 or assist in any manner such unauthorized appropriation,  
8 diversion, impoundment, use, or other restraint. No person  
9 or corporation may, directly or indirectly, personally or  
10 through an agent, officer, or employee, attempt to  
11 appropriate, divert, impound, use, or otherwise restrain or  
12 control waters within the boundaries of this state except  
13 in accordance with this section."

14       Section 5. Section 85-2-312, MCA, is amended to read:

15       "85-2-312. Terms of permit. (1) The department may  
16 issue a permit for less than the amount of water requested,  
17 but in no case may it issue a permit for more water than is  
18 requested or than can be beneficially used without waste for  
19 the purpose stated in the application. The department may  
20 require modification of plans and specifications for the  
21 appropriation or related diversion or construction. ~~It~~ Based  
22 upon the criteria listed in 85-2-311, the department may  
23 issue a permit subject to terms, conditions, restrictions,  
24 and limitations it considers necessary ~~to-protect-the-rights~~  
25 ~~of-other--appropriators~~, and it may issue temporary or

1 seasonal permits. A permit shall be issued subject to  
2 existing rights and any final determination of those rights  
3 made under this chapter.

4 (2) The department may limit the time for commencement  
5 of the appropriation works, completion of construction, and  
6 actual application of the water to the proposed beneficial  
7 use. In fixing those time limits, the department shall  
8 consider the cost and magnitude of the project, the  
9 engineering and physical features to be encountered, and, on  
10 projects designed for gradual development and gradually  
11 increased use of water, the time reasonably necessary for  
12 that gradual development and increased use. For good cause  
13 shown by the permittee, the department may in its discretion  
14 reasonably extend time limits.

15 (3) The original of the permit shall be sent to the  
16 permittee, and a copy shall be kept in the office of the  
17 department in Helena.

18 (4) The department shall provide to the county clerk  
19 and recorder of the county wherein the point of diversion or  
20 place of use is located quarterly reports and an annual  
21 summary report of all water right permits, certificates, and  
22 change approvals issued by the department within the  
23 county."

24 Section 6. Section 85-2-124, MCA, is amended to read:

25 "85-2-124. Fees for environmental impact statements.



1 (1) Whenever the department determines that the filing of an  
2 application (or a combination of applications) for a permit  
3 or approval under this chapter requires the preparation of  
4 an environmental impact statement as prescribed by the  
5 Montana Environmental Policy Act and the application (or  
6 combination of applications) involves the use of ~~10,000~~  
7 4,000 or more acre-feet per year ~~or 15~~ and 5.5 or more cubic  
8 feet per second of water, the applicant shall pay to the  
9 department the fee prescribed in this section. The  
10 department shall notify the applicant in writing within 90  
11 days of receipt of a correct and complete application (or a  
12 combination of applications) if it determines that an  
13 environmental impact statement and fee is required.

14 (2) Upon notification by the department under  
15 subsection (1), the applicant shall pay a fee based upon the  
16 estimated cost of constructing, repairing, or changing the  
17 appropriation and diversion facilities as herein provided.  
18 The maximum fee that shall be paid to the department may not  
19 exceed the fees set forth in the following declining scale:  
20 2% of the estimated cost up to \$1 million; plus 1% of the  
21 estimated cost over \$1 million and up to \$20 million; plus  
22 1/2 of 1% of the estimated cost over \$20 million and up to  
23 \$100 million; plus 1/4 of 1% of the estimated cost over \$100  
24 million and up to \$300 million; plus 1/8 of 1% of the  
25 estimated cost over \$300 million. The fee shall be

1 deposited in the state special revenue fund to be used by  
2 the department only to comply with the Montana Environmental  
3 Policy Act in connection with the application(s). Any  
4 amounts paid by the applicant but not actually expended by  
5 the department shall be refunded to the applicant.

6 (3) The department and the applicant may determine by  
7 agreement the estimated cost of any facility for purposes of  
8 computing the amount of the fee to be paid to the department  
9 by the applicant. The department may contract with an  
10 applicant for:

11 (a) the development of information by the applicant or  
12 a third party on behalf of the department and the applicant  
13 concerning the environmental impact of any proposed activity  
14 under an application;

15 (b) the division of responsibility between the  
16 department and an applicant for supervision over, control  
17 of, and payment for the development of information by the  
18 applicant or a third party on behalf of the department and  
19 the applicant under any such contract or contracts;

20 (c) the use or nonuse of a fee or any part thereof  
21 paid to the department by an applicant.

22 (4) Any payments made to the department or any third  
23 party by an applicant under any such contract or contracts  
24 shall be credited against any fee the applicant must pay  
25 hereunder. The department and the applicant may agree on

1 additional credits against the fee for environmental work  
2 performed by the applicant at the applicant's own expense.

3 (5) No fee as prescribed by this section may be  
4 assessed against an applicant for a permit or approval if  
5 the applicant has also filed an application for a  
6 certificate of environmental compatibility or public need  
7 pursuant to the Montana Major Facility Siting Act and the  
8 appropriation or use of water involved in the application(s)  
9 for permit or approval has been or will be studied by the  
10 department pursuant to that act.

11 (6) This section shall apply to all applications,  
12 pending or hereinafter filed, for which the department has  
13 not, as of April 9, 1975, commenced writing an environmental  
14 impact statement. This section shall not apply to any  
15 application, the fee for which would not exceed \$2,500.

16 (7) Failure to submit the fee as required by this  
17 section shall void the application(s).

18 (8) The department may in its discretion rely upon the  
19 environmental studies, investigations, reports, and  
20 assessments made by any other state agency or any person,  
21 including any applicant, in the preparation of its  
22 environmental impact statement."

23 Section 7. Section 85-2-402, MCA, is amended to read:

24 "85-2-402. Changes in appropriation rights. ~~(1)-An~~  
25 ~~appropriator may not change the place of diversion, place of~~

1 use, purpose of use, or place of storage except as permitted  
2 under this section and approved by the department.

3 (2) -- The department shall approve the proposed change  
4 if it determines that the proposed change will not adversely  
5 affect the rights of other persons. -- If the department  
6 determines that the proposed change might adversely affect  
7 the rights of other persons, notice of the proposed change  
8 shall be given in accordance with 85-2-307. -- If the  
9 department determines that an objection filed by a person  
10 whose rights may be affected states a valid objection to the  
11 proposed change, the department shall hold a hearing thereon  
12 prior to its approval or denial of the proposed change.  
13 Objections shall meet the requirements of 85-2-308(2), and  
14 hearings shall be held in accordance with 85-2-309.

15 (3) -- An appropriator of more than 15 cubic feet per  
16 second may not change the purpose of use of an appropriation  
17 right from an agricultural or irrigation use to an  
18 industrial use.

19 (4) -- The department may approve a change subject to  
20 such terms, conditions, restrictions, and limitations it  
21 considers necessary to protect the rights of other  
22 appropriators, including limitations on the time for  
23 completion of the change.

24 (5) -- If a change is not completed as approved by the  
25 department or if the terms, conditions, restrictions, and



1 limitations-of-the-change-approval-are--not--complied--with;  
 2 the---department--may7--after--notice--and--opportunity--for  
 3 hearing7-require-the-appropriator--to--show--cause--why--the  
 4 change--approval--should--not-be-modified-or-revoked7-if-the  
 5 appropriator-fails-to-show-sufficient-cause7-the--department  
 6 may-modify-or-revoke-the-change-approval7

7 (6)--Without---obtaining---prior---approval---from--the  
 8 department7-an-appropriator-may-not-sever-all-or-any-part-of  
 9 an--appropriation--right--from--the--land--to--which--it--is  
 10 appurtenant7-sell-the-appropriation-right-for-other-purposes  
 11 or---to---other--lands7--or--make--the--appropriation--right  
 12 appurtenant-to-other-lands7-The-department-shall-approve-the  
 13 proposed-change-if-it-determines-that--the--proposed--change  
 14 will-not-adversely-affect-the-water-rights-of-other-persons7  
 15 if--the-department-determines-that-the-proposed-change-might  
 16 adversely-affect-the-water-rights-of-other--persons7--notice  
 17 of--the--proposed--change--must--be-given-in-accordance-with  
 18 85-2-3077--if--the--department--then--determines---that---an  
 19 objection--filed--by--a--person--whose--water--rights-may-be  
 20 affected-states-a-valid-objection-to--the--proposed--change7  
 21 the--department--shall--hold--a-hearing-thereon-prior-to-its  
 22 approval-or-denial-of-the-proposed-change7--Objections--must  
 23 meet-the-requirements-of-85-2-3087-and-hearings-must-be-held  
 24 in--accordance--with-85-2-3097 (1) An appropriator may not  
 25 make a change in an appropriation right except as permitted

1 under this section and with the approval of the department  
2 or, if applicable, of the legislature.

3 (2) Except as provided in subsections (3) through (5),  
4 the department shall approve a change in appropriation right  
5 if the appropriator proves by substantial credible evidence  
6 that the following criteria are met:

7 (a) The proposed use will not adversely affect the  
8 water rights of other persons or other planned uses or  
9 developments for which a permit has been issued or for which  
10 water has been reserved.

11 (b) The proposed means of diversion, construction, and  
12 operation of the appropriation works are adequate.

13 (c) The proposed use of water is a beneficial use.

14 (3) The department may not approve a change in purpose  
15 of use or place of use of an appropriation of 4,000 or more  
16 acre-feet of water a year and 5.5 or more cubic feet per  
17 second of water unless the appropriator proves by clear and  
18 convincing evidence that:

19 (a) the criteria in subsection (2) are met;

20 (b) the proposed change is a reasonable use. A  
21 finding of reasonable use must be based on a consideration  
22 of:

23 (i) the existing demands on the state water supply, as  
24 well as projected demands of water for future beneficial  
25 purposes, including municipal water supplies, irrigation

1 systems, and minimum streamflows for the protection of  
2 existing water rights and aquatic life;

3 (ii) the benefits to the applicant and the state;

4 (iii) the effects on the quantity and quality of water  
5 for existing uses in the source of supply;

6 (iv) the availability and feasibility of using  
7 low-quality water for the purpose for which application has  
8 been made;

9 (v) the effects on private property rights by any  
10 creation of or contribution to saline seep; and

11 (vi) the probable significant adverse environmental  
12 impacts of the proposed use of water as determined by the  
13 department pursuant to Title 75, chapter 1, or Title 75,  
14 chapter 20.

15 (4) The department may not approve a change in purpose  
16 of use or place of use for a diversion that results in 4,000  
17 or more acre-feet of water a year and 5.5 or more cubic feet  
18 per second of water being consumed unless:

19 (a) the applicant proves by clear and convincing  
20 evidence and the department finds that the criteria in  
21 subsections (2) and (3) are met; and

22 (b) the department then petitions the legislature and  
23 the legislature affirms the decision of the department after  
24 a public hearing.

25 (5) (a) The state of Montana has long recognized the

1 importance of conserving its public waters and the necessity  
2 to maintain adequate water supplies for the state's water  
3 requirements. Although the state of Montana also recognizes  
4 that, under appropriate conditions, the out-of-state  
5 transportation and use of its public waters are not in  
6 conflict with the public welfare of its citizens or the  
7 conservation of its waters, the following criteria must be  
8 met before out-of-state use may occur:

9 (b) The department and, if applicable, the legislature  
10 may not approve a change in appropriation right for the  
11 withdrawal and transportation of appropriated water for use  
12 outside the state unless the appropriator proves by clear  
13 and convincing evidence and, if applicable, the legislature  
14 approves after a public hearing that:

15 (i) depending on the volume of water diverted or  
16 consumed, the applicable criteria and procedures of  
17 subsection (2) or (3) are met;

18 (ii) the proposed out-of-state use of water is not  
19 contrary to water conservation in Montana; and

20 (iii) the proposed out-of-state use of water is not  
21 otherwise detrimental to the public welfare of the citizens  
22 of Montana.

23 (c) In determining whether the appropriator has proved  
24 by clear and convincing evidence that the requirements of  
25 subsections (5)(b)(ii) and (5)(b)(iii) will be met, the



1 department and, if applicable, the legislature shall  
2 consider the following factors:

3 (i) whether there are present or projected water  
4 shortages within the state of Montana;

5 (ii) whether the water that is the subject of the  
6 proposed change in appropriation might feasibly be  
7 transported to alleviate water shortages within the state of  
8 Montana;

9 (iii) the supply and sources of water available to the  
10 applicant in the state where the applicant intends to use  
11 the water; and

12 (iv) the demands placed on the applicant's supply in  
13 the state where the applicant intends to use the water.

14 (d) When applying for a change in appropriation right  
15 to withdraw and transport water for use outside the state,  
16 the applicant shall submit to and comply with the laws of  
17 the state of Montana governing the appropriation and use of  
18 water.

19 (6) For any application for a change in appropriation  
20 right involving 4,000 or more acre-feet of water a year and  
21 5.5 or more cubic feet per second of water, the department  
22 shall give notice of the proposed change in accordance with  
23 85-2-307 and shall hold a hearing in accordance with  
24 85-2-309 prior to its approval or denial of the proposed  
25 change. The department shall provide notice and may hold a

1 hearing upon any other proposed change if it determines that  
2 such a change might adversely affect the rights of other  
3 persons.

4 (7) The department or the legislature, if applicable,  
5 may approve a change subject to such terms, conditions,  
6 restrictions, and limitations as it considers necessary to  
7 protect the rights of other persons and satisfy the criteria  
8 of this section, including limitations on the time for  
9 completion of the change.

10 (8) If a change is not completed as approved by the  
11 department or legislature or if the terms, conditions,  
12 restrictions, and limitations of the change approval are not  
13 complied with, the department may, after notice and  
14 opportunity for hearing, require the appropriator to show  
15 cause why the change approval should not be modified or  
16 revoked. If the appropriator fails to show sufficient  
17 cause, the department may modify or revoke the change  
18 approval.

19 †7†(9) The original of a change approval issued by the  
20 department must be sent to the applicant, and a duplicate  
21 must be kept in the office of the department in Helena.

22 †8†(10) A person holding an issued permit or change  
23 approval that has not been perfected may change the place of  
24 diversion, place of use, purpose of use, or place of storage  
25 by filing an application for change pursuant to this

1 section.

2 (11) A change in appropriation right contrary to the  
3 provisions of this section is invalid. No officer, agent,  
4 agency, or employee of the state may knowingly permit, aid,  
5 or assist in any manner such unauthorized change in  
6 appropriation right. No person or corporation may, directly  
7 or indirectly, personally or through an agent, officer, or  
8 employee, attempt to change an appropriation right except in  
9 accordance with this section."

10 Section 8. Section 75-20-104, MCA, is amended to read:

11 "75-20-104. Definitions. In this chapter, unless the  
12 context requires otherwise, the following definitions apply:

13 (1) "Addition thereto" means the installation of new  
14 machinery and equipment which would significantly change the  
15 conditions under which the facility is operated.

16 (2) "Application" means an application for a  
17 certificate submitted in accordance with this chapter and  
18 the rules adopted hereunder.

19 (3) "Associated facilities" includes but is not  
20 limited to transportation links of any kind, aqueducts,  
21 diversion dams, transmission substations, storage ponds,  
22 reservoirs, and any other device or equipment associated  
23 with the production or delivery of the energy form or  
24 product produced by a facility, except that the term does  
25 not include a facility.

1           (4) "Board" means the board of natural resources and  
2 conservation provided for in 2-15-3302.

3           (5) "Board of health" means the board of health and  
4 environmental sciences provided for in 2-15-2104.

5           (6) "Certificate" means the certificate of  
6 environmental compatibility and public need issued by the  
7 board under this chapter that is required for the  
8 construction or operation of a facility.

9           (7) "Commence to construct" means:

10          (a) any clearing of land, excavation, construction, or  
11 other action that would affect the environment of the site  
12 or route of a facility but does not mean changes needed for  
13 temporary use of sites or routes for nonutility purposes or  
14 uses in securing geological data, including necessary  
15 borings to ascertain foundation conditions;

16          (b) the fracturing of underground formations by any  
17 means if such activity is related to the possible future  
18 development of a gasification facility or a facility  
19 employing geothermal resources but does not include the  
20 gathering of geological data by boring of test holes or  
21 other underground exploration, investigation, or  
22 experimentation;

23          (c) the commencement of eminent domain proceedings  
24 under Title 70, chapter 30, for land or rights-of-way upon  
25 or over which a facility may be constructed;



1 (d) the relocation or upgrading of an existing  
2 facility defined by (b) or (c) of subsection (10), including  
3 upgrading to a design capacity covered by subsection  
4 (10)(b), except that the term does not include normal  
5 maintenance or repair of an existing facility.

6 (8) "Department" means the department of natural  
7 resources and conservation provided for in Title 2, chapter  
8 15, part 33.

9 (9) "Department of health" means the department of  
10 health and environmental sciences provided for in Title 2,  
11 chapter 15, part 21.

12 (10) "Facility" means:

13 (a) except for crude oil and natural gas refineries,  
14 and facilities and associated facilities designed for or  
15 capable of producing, gathering, processing, transmitting,  
16 transporting, or distributing crude oil or natural gas, and  
17 those facilities subject to The Montana Strip and  
18 Underground Mine Reclamation Act, each plant, unit, or other  
19 facility and associated facilities designed for or capable  
20 of:

21 (i) generating 50 megawatts of electricity or more or  
22 any addition thereto (except pollution control facilities  
23 approved by the department of health and environmental  
24 sciences added to an existing plant) having an estimated  
25 cost in excess of \$10 million;

1           (ii) producing 25 million cubic feet or more of gas  
2 derived from coal per day or any addition thereto having an  
3 estimated cost in excess of \$10 million;

4           (iii) producing 25,000 barrels of liquid hydrocarbon  
5 products per day or more or any addition thereto having an  
6 estimated cost in excess of \$10 million;

7           (iv) enriching uranium minerals or any addition thereto  
8 having an estimated cost in excess of \$10 million; or

9           (v) utilizing or converting 500,000 tons of coal per  
10 year or more or any addition thereto having an estimated  
11 cost in excess of \$10 million;

12          (b) each electric transmission line and associated  
13 facilities of a design capacity of more than 69 kilovolts,  
14 except that the term does not include an electric  
15 transmission line and associated facilities of a design  
16 capacity of 230 kilovolts or less and 10 miles or less in  
17 length;

18          (c) each pipeline and associated facilities designed  
19 for or capable of transporting gas (except for natural gas),  
20 water, or liquid hydrocarbon products from or to a facility  
21 located within or without this state of the size indicated  
22 in subsection (10)(a) of this section;

23          (d) each pipeline greater than 17 inches in diameter  
24 and 30 miles in length, and associated facilities;

25          ~~(d)~~(e) any use of geothermal resources, including the

1 use of underground space in existence or to be created, for  
2 the creation, use, or conversion of energy, designed for or  
3 capable of producing geothermally derived power equivalent  
4 to 25 million Btu per hour or more or any addition thereto  
5 having an estimated cost in excess of \$750,000;

6 ~~(e)~~(f) any underground in situ gasification of coal.

7 (11) "Person" means any individual, group, firm,  
8 partnership, corporation, cooperative, association,  
9 government subdivision, government agency, local government,  
10 or other organization or entity.

11 (12) "Transmission substation" means any structure,  
12 device, or equipment assemblage, commonly located and  
13 designed for voltage regulation, circuit protection, or  
14 switching necessary for the construction or operation of a  
15 proposed transmission line.

16 (13) "Utility" means any person engaged in any aspect  
17 of the production, storage, sale, delivery, or furnishing of  
18 heat, electricity, gas, hydrocarbon products, or energy in  
19 any form for ultimate public use."

20 Section 9. Section 75-20-216, MCA, is amended to read:

21 "75-20-216. Study, evaluation, and report on proposed  
22 facility -- assistance by other agencies. (1) After receipt  
23 of an application, the department and department of health  
24 shall within 90 days notify the applicant in writing that:

25 (a) the application is in compliance and is accepted

1 as complete; or

2 (b) the application is not in compliance and list the  
3 deficiencies therein; and upon correction of these  
4 deficiencies and resubmission by the applicant, the  
5 department and department of health shall within 30 days  
6 notify the applicant in writing that the application is in  
7 compliance and is accepted as complete.

8 (2) Upon receipt of an application complying with  
9 75-20-211 through 75-20-215, and this section, the  
10 department shall commence an intensive study and evaluation  
11 of the proposed facility and its effects, considering all  
12 applicable criteria listed in 75-20-301 and 75-20-503 and  
13 the department of health shall commence a study to enable it  
14 or the board of health to issue a decision, opinion, order,  
15 certification, or permit as provided in subsection (3). The  
16 department and department of health shall use, to the extent  
17 they consider applicable, valid and useful existing studies  
18 and reports submitted by the applicant or compiled by a  
19 state or federal agency.

20 (3) The department of health shall within 1 year  
21 following the date of acceptance of an application and the  
22 board of health or department of health, if applicable,  
23 within an additional 6 months issue any decision, opinion,  
24 order, certification, or permit required under the laws  
25 administered by the department of health or the board of



1 health and this chapter. The department of health and the  
2 board of health shall determine compliance with all  
3 standards, permit requirements, and implementation plans  
4 under their jurisdiction for the primary and reasonable  
5 alternate locations in their decision, opinion, order,  
6 certification, or permit. The decision, opinion, order,  
7 certification, or permit, with or without conditions, is  
8 conclusive on all matters that the department of health and  
9 board of health administer, and any of the criteria  
10 specified in subsections (2) through (7) of 75-20-503 that  
11 are a part of the determinations made under the laws  
12 administered by the department of health and the board of  
13 health. Although the decision, opinion, order,  
14 certification, or permit issued under this subsection is  
15 conclusive, the board retains authority to make the  
16 determination required under 75-20-301(2)(c). The decision,  
17 opinion, order, certification, or permit of the department  
18 of health or the board of health satisfies the review  
19 requirements by those agencies and shall be acceptable in  
20 lieu of an environmental impact statement under the Montana  
21 Environmental Policy Act. A copy of the decision, opinion,  
22 order, certification, or permit shall be served upon the  
23 department and the board and shall be utilized as part of  
24 their final site selection process. Prior to the issuance of  
25 a preliminary decision by the department of health and

1 pursuant to rules adopted by the board of health, the  
2 department of health shall provide an opportunity for public  
3 review and comment.

4 (4) Within 22 months following acceptance of an  
5 application for a facility as defined in (a) and ~~(d)~~(e) of  
6 75-20-104(10) and for a facility as defined in (b) ~~and-(c)~~  
7 through (d) of 75-20-104(10) which is more than 30 miles in  
8 length and within 1 year for a facility as defined in (b)  
9 ~~and-(c)~~ through (d) of 75-20-104(10) which is 30 miles or  
10 less in length, the department shall make a report to the  
11 board which shall contain the department's studies,  
12 evaluations, recommendations, other pertinent documents  
13 resulting from its study and evaluation, and an  
14 environmental impact statement or analysis prepared pursuant  
15 to the Montana Environmental Policy Act, if any. If the  
16 application is for a combination of two or more facilities,  
17 the department shall make its report to the board within the  
18 greater of the lengths of time provided for in this  
19 subsection for either of the facilities.

20 (5) The departments of highways; commerce; fish,  
21 wildlife, and parks; state lands; revenue; and public  
22 service regulation shall report to the department  
23 information relating to the impact of the proposed site on  
24 each department's area of expertise. The report may include  
25 opinions as to the advisability of granting, denying, or

1 modifying the certificate. The department shall allocate  
2 funds obtained from filing fees to the departments making  
3 reports to reimburse them for the costs of compiling  
4 information and issuing the required report."

5 Section 10. Section 75-20-218, MCA, is amended to  
6 read:

7 "75-20-218. Hearing date -- location -- department to  
8 act as staff -- hearings to be held jointly. (1) Upon  
9 receipt of the department's report submitted under  
10 75-20-216, the board shall set a date for a hearing to begin  
11 not more than 120 days after the receipt. ~~Except--for--those~~  
12 ~~hearings--involving-applications-submitted-for-facilities-as~~  
13 ~~defined-in--(b)--and--(c)--of--75-20-104(10),--certification~~  
14 Certification hearings shall be conducted by the board in  
15 the county seat of Lewis and Clark County or the county in  
16 which the facility or the greater portion thereof is to be  
17 located.

18 (2) Except as provided in 75-20-221(2), the department  
19 shall act as the staff for the board throughout the  
20 decisionmaking process and the board may request the  
21 department to present testimony or cross-examine witnesses  
22 as the board considers necessary and appropriate.

23 (3) At the request of the applicant, the department of  
24 health and the board of health shall hold any required  
25 permit hearings required under laws administered by those

1 agencies in conjunction with the board certification  
2 hearing. In such a conjunctive hearing the time periods  
3 established for reviewing an application and for issuing a  
4 decision on certification of a proposed facility under this  
5 chapter supersede the time periods specified in other laws  
6 administered by the department of health and the board of  
7 health."

8 Section 11. Section 75-20-303, MCA, is amended to  
9 read:

10 "75-20-303. Opinion issued with decision -- contents.

11 (1) In rendering a decision on an application for a  
12 certificate, the board shall issue an opinion stating its  
13 reasons for the action taken.

14 (2) If the board has found that any regional or local  
15 law or regulation which would be otherwise applicable is  
16 unreasonably restrictive pursuant to 75-20-301(2)(f), it  
17 shall state in its opinion the reasons therefor.

18 (3) Any certificate issued by the board shall include  
19 the following:

20 (a) an environmental evaluation statement related to  
21 the facility being certified. The statement shall include  
22 but not be limited to analysis of the following information:

23 (i) the environmental impact of the proposed facility;

24 (ii) any adverse environmental effects which cannot be  
25 avoided by issuance of the certificate;



1 (iii) problems and objections raised by other federal  
2 and state agencies and interested groups;

3 (iv) alternatives to the proposed facility;

4 (v) a plan for monitoring environmental effects of the  
5 proposed facility; and

6 (vi) a time limit as provided in subsection (4), during  
7 which construction of the facility must be completed;

8 (b) a statement signed by the applicant showing  
9 agreement to comply with the requirements of this chapter  
10 and the conditions of the certificate.

11 (4) The board shall issue as part of the certificate  
12 the following time limits during which construction of a  
13 facility must be completed:

14 (a) For a facility as defined in (b), or (c), or (d)  
15 of 75-20-104(10) that is more than 30 miles in length, the  
16 time limit is 10 years.

17 (b) For a facility as defined in (b), or (c), or (d)  
18 of 75-20-104(10) that is 30 miles or less in length, the  
19 time limit is 5 years.

20 (c) The time limit shall be extended for periods of 2  
21 years each upon a showing by the applicant to the board that  
22 a good faith effort is being undertaken to complete  
23 construction. Under this subsection, a good faith effort to  
24 complete construction includes the process of acquiring any  
25 necessary state or federal permit or certificate for the

1 facility and the process of judicial review of any such  
2 permit or certificate.

3 (5) The provisions of subsection (4) apply to any  
4 facility for which a certificate has not been issued or for  
5 which construction is yet to be commenced."

6 Section 12. Section 75-20-304, MCA, is amended to  
7 read:

8 "75-20-304. Waiver of provisions of certification  
9 proceedings. (1) The board may waive compliance with any of  
10 the provisions of 75-20-216 through 75-20-222, 75-20-501,  
11 and this part if the applicant makes a clear and convincing  
12 showing to the board at a public hearing that an immediate,  
13 urgent need for a facility exists and that the applicant did  
14 not have knowledge that the need for the facility existed  
15 sufficiently in advance to fully comply with the provisions  
16 of 75-20-216 through 75-20-222, 75-20-501, and this part.

17 (2) The board may waive compliance with any of the  
18 provisions of this chapter upon receipt of notice by a  
19 utility or person subject to this chapter that a facility or  
20 associated facility has been damaged or destroyed as a  
21 result of fire, flood, or other natural disaster or as the  
22 result of insurrection, war, or other civil disorder and  
23 there exists an immediate need for construction of a new  
24 facility or associated facility or the relocation of a  
25 previously existing facility or associated facility in order

1 to promote the public welfare.

2 (3) The board shall waive compliance with the  
3 requirements of subsections (2)(c), (3)(b), and (3)(c) of  
4 75-20-301 and 75-20-501(5) and the requirements of  
5 subsections (1)(a)(iv) and (v) of 75-20-211, 75-20-216(3),  
6 and 75-20-303(3)(a)(iv) relating to consideration of  
7 alternative sites if the applicant makes a clear and  
8 convincing showing to the board at a public hearing that:

9 (a) a proposed facility will be constructed in a  
10 county where a single employer within the county has  
11 permanently curtailed or ceased operations causing a loss of  
12 250 or more permanent jobs within 2 years at the employer's  
13 operations within the preceding 10-year period;

14 (b) the county and municipal governing bodies in whose  
15 jurisdiction the facility is proposed to be located support  
16 by resolution such a waiver;

17 (c) the proposed facility will be constructed within a  
18 15-mile radius of the operations that have ceased or been  
19 curtailed; and

20 (d) the proposed facility will have a beneficial  
21 effect on the economy of the county in which the facility is  
22 proposed to be located.

23 (4) The waiver provided for in subsection (3) applies  
24 only to permanent job losses by a single employer. The  
25 waiver provided for in subsection (3) does not apply to jobs

1 of a temporary or seasonal nature, including but not limited  
2 to construction jobs, or job losses during labor disputes.

3 (5) The waiver provided for in subsection (3) does not  
4 apply to consideration of alternatives or minimum adverse  
5 environmental impact for a facility defined in subsections  
6 (10)(b), (c), (d), (e), or ~~te~~ (f) of 75-20-104, for an  
7 associated facility defined in subsection (3) of 75-20-104,  
8 or for any portion of or process in a facility defined in  
9 subsection (10)(a) of 75-20-104 to the extent that the  
10 process or portion of the facility is not subject to a  
11 permit issued by the department of health or board of  
12 health.

13 (6) The applicant shall pay all expenses required to  
14 process and conduct a hearing on a waiver request under  
15 subsection (3). However, any payments made under this  
16 subsection shall be credited toward the fee paid under  
17 75-20-215 to the extent the data or evidence presented at  
18 the hearing or the decision of the board under subsection  
19 (3) can be used in making a certification decision under  
20 this chapter.

21 (7) The board may grant only one waiver under  
22 subsections (3) and (4) for each permanent loss of jobs as  
23 defined in subsection (3)(a)."

24 Section 13. Section 75-20-1202, MCA, is amended to  
25 read:



1           "75-20-1202. Definitions. As used in this part and  
2   75-20-201 through 75-20-203, the following definitions  
3   apply:

4           (1) (a) "Nuclear facility" means each plant, unit, or  
5   other facility designed for or capable of:

6           (i) generating 50 megawatts of electricity or more by  
7   means of nuclear fission;

8           (ii) converting, enriching, fabricating, or  
9   reprocessing uranium minerals or nuclear fuels; or

10          (iii) storing or disposing of radioactive wastes or  
11   materials from a nuclear facility.

12          (b) "Nuclear facility" does not include any  
13   small-scale facility used solely for educational, research,  
14   or medical purposes not connected with the commercial  
15   generation of energy.

16          (2) "Facility", as defined in 75-20-104~~(7)~~(10), is  
17   further defined to include any nuclear facility as defined  
18   in subsection (1)(a) of this section."

19          NEW SECTION. Section 14. Water leasing program. (1)  
20   There is a water leasing program administered by the  
21   department on behalf of the state of Montana.

22          (2) The department may acquire rights to water needed  
23   for leasing under this program through appropriation of  
24   water in its own name or by agreement with or purchase from  
25   another holder of water rights.

1           (3) Water for leasing under the water leasing program  
2 must be obtained from the following sources:

3           (a) any existing or future reservoir in a basin  
4 concerning which a temporary preliminary decree, a  
5 preliminary decree under 85-2-231, or a final decree under  
6 85-2-234 has been entered;

7           (b) Fort Peck Reservoir, if an agreement between the  
8 department and the federal government concerning the  
9 acquisition of water and the sharing of revenues with the  
10 state is in effect;

11           (c) Tiber, Canyon Ferry, Hungry Horse, or Yellowtail  
12 Reservoirs if and for so long as there is an agreement  
13 between the department and the federal government concerning  
14 the acquisition of water and sharing of revenues with the  
15 state from one or more of these reservoirs; and

16           (d) any other existing or future federal reservoir:

17           (i) located in a basin concerning which a temporary  
18 preliminary decree, a preliminary decree under 85-2-231, or  
19 a final decree under 85-2-234 has been entered; and

20           (ii) for which and for so long as there is an agreement  
21 between the department and the federal government concerning  
22 the acquisition of water and the sharing of revenues with  
23 the state.

24           (4) Water may be leased for any beneficial use. The  
25 amount of water that can be leased under this program for

1 all beneficial uses shall not exceed 50,000 acre-feet.

2 (5) The term of any lease may not exceed 50 years. A  
3 term may be extended up to another 50 years if the  
4 department again determines the desirability of leasing by  
5 applying the considerations set forth in subsection (7). In  
6 making such a redetermination, the department may require  
7 the completion of an environmental impact statement in  
8 accordance with subsection (6).

9 (6) The department shall require the completion of an  
10 environmental impact statement under the provisions of Title  
11 75, chapter 1, for lease applications that would result in  
12 the consumption of 4,000 acre-feet a year or more and 5.5  
13 cubic feet per second or more of water and for any other  
14 application for which an environmental impact statement is  
15 required by law. The department shall require the  
16 completion of an environmental impact statement whenever the  
17 cumulative effect of more than one application for a lease  
18 would constitute a probable significant environmental  
19 impact.

20 (7) Upon application by any person to lease water, the  
21 department shall make an initial determination of whether it  
22 is desirable for the department to lease water to the  
23 applicant. Such a determination of desirability shall be  
24 made solely on the following considerations:

25 (a) the content of the environmental impact statement,

1 if required;

2 (b) whether there is sufficient water available under  
3 the water leasing program; and

4 (c) whether the criteria, except as to legislative  
5 approval, set forth in 85-2-311 have been satisfied.

6 (8) The department shall for any agreement require  
7 commercially reasonable terms and conditions, which may  
8 include the requirement that up to 25% of the water to be  
9 leased be made available to a potential user for any  
10 beneficial use upon payment by such user of the costs of  
11 tapping into and removing water from the applicant's  
12 project. The department may differentiate in pricing,  
13 depending on the proposed beneficial use of the water.

14 (9) The lease of water or the use of water under a  
15 lease does not constitute a permit as provided in 85-2-102  
16 and does not establish a right to appropriate water within  
17 the meaning of Title 85, chapter 2, part 3.

18 (10) For purposes of the water leasing program  
19 established in this section, it is the intent of the  
20 legislature that the state act as a proprietor.

21 Section 15. Section 85-1-205, MCA, is amended to read:

22 "85-1-205. Acquisition of water in federal reservoirs.  
23 {†} The department may acquire water or water storage by  
24 purchase option or agreement with the federal government  
25 from any federal reservoir for the purpose of sale, rent, or



1 distribution for ~~industrial-and-other--uses~~ any beneficial  
 2 use. In such cases, the department is not required to  
 3 construct any diversion or appropriation facilities or  
 4 works, and it may sell, rent, or distribute such water at  
 5 such rates and under such terms and conditions as it  
 6 considers appropriate, ~~except-as-provided-in-subsection-(2).~~

7 ~~(2)--Until--a--final-decree-has-been-issued-pursuant-to~~  
 8 ~~85-2-234-concerning-the-waters-in-a-federal--reservoir,--the~~  
 9 ~~department--may--sell,--rent,--or-distribute-such-water-only~~  
 10 ~~after-a-permit-has-been-issued-to-an-applicant-for-purchase,~~  
 11 ~~rent,--or-distribution-of-water-in-accordance-with-part-3--of~~  
 12 ~~this-chapter."~~

13 Section 16. Section 85-2-316, MCA, is amended to read:

14 "85-2-316. Reservation of waters. (1) The state or any  
 15 political subdivision or agency thereof or the United States  
 16 or any agency thereof may apply to the board to reserve  
 17 waters for existing or future beneficial uses or to maintain  
 18 a minimum flow, level, or quality of water throughout the  
 19 year or at such periods or for such length of time as the  
 20 board designates.

21 (2) Water may be reserved only for existing or future  
 22 beneficial uses in the following river basins:

23 (a) the Clark Fork River and its tributaries to its  
 24 confluence with Lake Pend Oreille in Idaho;

25 (b) the Kootenai River and its tributaries to its

1 confluence with Kootenay Lake in British Columbia;

2 (c) the St. Mary River and its tributaries to its  
3 confluence with the Oldman River in Alberta;

4 (d) the Little Missouri River and its tributaries to  
5 its confluence with Lake Sakakawea in North Dakota;

6 (e) the Missouri River and its tributaries to its  
7 confluence with the Yellowstone River in North Dakota; and

8 (f) the Yellowstone River to its confluence with the  
9 Missouri River in North Dakota.

10 ~~(2)~~(3) Upon receiving an application, the department  
11 shall proceed in accordance with 85-2-307 through 85-2-309.  
12 After the hearing provided in 85-2-309, the board shall  
13 decide whether to reserve the water for the applicant. The  
14 department's costs of giving notice, holding the hearing,  
15 conducting investigations, and making records incurred in  
16 acting upon the application to reserve water, except the  
17 cost of salaries of the department's personnel, shall be  
18 paid by the applicant. In addition, a reasonable proportion  
19 of the department's cost of preparing an environmental  
20 impact statement shall be paid by the applicant unless  
21 waived by the department upon a showing of good cause by the  
22 applicant.

23 ~~(3)~~(4) (a) The board may not adopt an order reserving  
24 water unless the applicant establishes to the satisfaction  
25 of the board:

1        ~~(a)~~(i) the purpose of the reservation;  
2        ~~(b)~~(ii) the need for the reservation;  
3        ~~(c)~~(iii) the amount of water necessary for the purpose  
4 of the reservation;

5        ~~(d)~~(iv) that the reservation is in the public interest.

6        (b) In determining the public interest under  
7 subsection (4)(a)(iv), the board may not adopt an order  
8 reserving water for withdrawal and transport for use outside  
9 the state unless the applicant proves by clear and  
10 convincing evidence that:

11        (i) the proposed out-of-state use of water is not  
12 contrary to water conservation in Montana; and

13        (ii) the proposed out-of-state use of water is not  
14 otherwise detrimental to the public welfare of the citizens  
15 of Montana.

16        (c) In determining whether the applicant has proved by  
17 clear and convincing evidence that the requirements of  
18 subsections (4)(b)(i) and (4)(b)(ii) are met, the board  
19 shall consider the following factors:

20        (i) whether there are present or projected water  
21 shortages within the state of Montana;

22        (ii) whether the water that is the subject of the  
23 application could feasibly be transported to alleviate water  
24 shortages within the state of Montana;

25        (iii) the supply and sources of water available to the

1 applicant in the state where the applicant intends to use  
2 the water; and

3 (iv) the demands placed on the applicant's supply in  
4 the state where the applicant intends to use the water.

5 (d) When applying for a reservation to withdraw and  
6 transport water for use outside the state, the applicant  
7 shall submit to and comply with the laws of the state of  
8 Montana governing the appropriation, lease, use, and  
9 reservation of water.

10 (4)(5) If the purpose of the reservation requires  
11 construction of a storage or diversion facility, the  
12 applicant shall establish to the satisfaction of the board  
13 that there will be progress toward completion of the  
14 facility and accomplishment of the purpose with reasonable  
15 diligence in accordance with an established plan.

16 (5)(6) The board shall limit any reservations after  
17 May 9, 1979, for maintenance of minimum flow, level, or  
18 quality of water that it awards at any point on a stream or  
19 river to a maximum of 50% of the average annual flow of  
20 record on gauged streams. Ungauged streams can be allocated  
21 at the discretion of the board.

22 (6)(7) After the adoption of an order reserving  
23 waters, the department may reject an application and refuse  
24 a permit for the appropriation of reserved waters or may,  
25 with the approval of the board, issue the permit subject to



1 such terms and conditions it considers necessary for the  
2 protection of the objectives of the reservation.

3 ~~(7)~~(8) Any person desiring to use water reserved to a  
4 conservation district for agricultural purposes shall make  
5 application for such use with the district, and the district  
6 upon approval of the application must inform the department  
7 of the approved use. The department shall maintain records  
8 of all uses of water reserved to conservation districts and  
9 be responsible, when requested by the districts, for  
10 rendering technical and administrative assistance within the  
11 department's staffing and budgeting limitations in the  
12 preparation and processing of such applications for the  
13 conservation districts. The department shall, within its  
14 staffing and budgeting limitations, complete any feasibility  
15 study requested by the districts within 12 months of the  
16 time the request was made. The board shall extend the time  
17 allowed to develop a plan identifying projects for utilizing  
18 a district's reservation so long as the conservation  
19 district makes a good faith effort, within its staffing and  
20 budget limitations, to develop a plan.

21 ~~(8)~~(9) A reservation under this section shall date  
22 from the date the order reserving the water is adopted by  
23 the board and shall not adversely affect any rights in  
24 existence at that time.

25 ~~(9)~~(10) The board shall, periodically but at least once

1 every 10 years, review existing reservations to ensure that  
2 the objectives of the reservation are being met. Where the  
3 objectives of the reservation are not being met, the board  
4 may extend, revoke, or modify the reservation.

5 ~~{10}~~(11) The board may modify an existing or future  
6 order originally adopted to reserve water for the purpose of  
7 maintaining minimum flow, level, or quality of water, so as  
8 to reallocate such reservation or portion thereof to an  
9 applicant who is a qualified reservant under this section.  
10 Reallocation of reserved water may be made by the board  
11 following notice and hearing wherein the board finds that  
12 all or part of the reservation is not required for its  
13 purpose and that the need for the reallocation has been  
14 shown by the applicant to outweigh the need shown by the  
15 original reservant. Reallocation of reserved water shall not  
16 adversely affect the priority date of the reservation, and  
17 the reservation shall retain its priority date despite  
18 reallocation to a different entity for a different use. The  
19 board may not reallocate water reserved under this section  
20 on any stream or river more frequently than once every 5  
21 years.

22 ~~{11}~~(12) Nothing in this section vests the board with  
23 the authority to alter a water right that is not a  
24 reservation.

25 (13) The department shall undertake a program to

1 educate the public, other state agencies, and political  
2 subdivisions of the state as to the benefits of the  
3 reservation process and the procedures to be followed to  
4 secure the reservation of water. The department shall  
5 provide technical assistance to other state agencies and  
6 political subdivisions in applying for reservations under  
7 this section.

8 (14) Water reserved under this section is not subject  
9 to the state water leasing program established under  
10 [section 14]."

11 NEW SECTION. Section 17. Reservations within Missouri  
12 River basin. (1) The state or any agency or political  
13 subdivision thereof or the United States or any agency  
14 thereof that desires to apply for a reservation of water in  
15 the Missouri River basin shall file a claim pursuant to  
16 85-2-316 no later than July 1, 1987.

17 (2) The department shall provide technical and  
18 financial assistance to other state agencies and political  
19 subdivisions in applying for reservations within the  
20 Missouri River basin.

21 (3) Before December 31, 1989, the board shall make a  
22 final determination in accordance with 85-2-316 on all  
23 applications filed before July 1, 1987, for reservations of  
24 water in the Missouri River basin.

25 (4) Water reservations approved by the board under

1 this section have a priority date of July 1, 1985. The board  
2 shall by order establish the relative priority of  
3 applications approved under this section.

4 Section 18. Section 85-2-112, MCA, is amended to read:

5 "85-2-112. Department duties. The department shall:

6 (1) enforce and administer this chapter and rules  
7 adopted by the board under 85-2-113, subject to the powers  
8 and duties of the supreme court under 3-7-204;

9 (2) prescribe procedures, forms, and requirements for  
10 applications, permits, certificates, claims of existing  
11 rights, and proceedings under this chapter and prescribe the  
12 information to be contained in any application, claim of  
13 existing right, or other document to be filed with the  
14 department under this chapter not inconsistent with the  
15 requirements of this chapter;

16 (3) establish and keep in its Helena office a  
17 centralized record system of all existing rights and a  
18 public record of permits, certificates, claims of existing  
19 rights, applications, and other documents filed in its  
20 office under this chapter;

21 (4) in cooperation with other state agencies,  
22 institutions, colleges, and universities, establish and  
23 maintain a centralized and efficient water resources data  
24 management system sufficient to make available and readily  
25 accessible, in a usable format, to state agencies and other



1 interested persons, information on the state's water  
2 resources, out-of-state water resources that affect the  
3 state, existing and potential uses, and existing and  
4 potential demand. All other state agencies, institutions,  
5 and colleges and universities shall cooperate with the  
6 department in the development and maintenance of this  
7 system.

8 ~~(4)~~(5) cooperate with, assist, advise, and coordinate  
9 plans and activities with the federal, state, and local  
10 agencies in matters relating to this chapter;

11 ~~(5)~~(6) upon request by any person, cooperate with,  
12 assist, and advise that person in matters pertaining to  
13 measuring water or filing claims of existing rights with a  
14 district court under this chapter;

15 ~~(6)~~(7) adopt rules necessary to reject, modify, or  
16 condition permit applications in highly appropriated basins  
17 or subbasins as provided in 85-2-319."

18 Section 19. Section 85-1-203, MCA, is amended to read:

19 "85-1-203. State water plan. (1) The department shall  
20 gather from any source reliable information relating to  
21 Montana's water resources and prepare therefrom a continuing  
22 comprehensive inventory of the water resources of the state.  
23 In preparing this inventory, the department may conduct  
24 studies; adopt studies made by other competent water  
25 resource groups, including federal, regional, state, or

1 private agencies; perform research or employ other competent  
2 agencies to perform research on a contract basis; and hold  
3 public hearings in affected areas at which all interested  
4 parties shall be given an opportunity to appear.

5 (2) The department shall formulate and, with the  
6 approval of the board, adopt and from time to time amend,  
7 extend, or add to a comprehensive, coordinated multiple-use  
8 water resources plan known as the "state water plan". The  
9 state water plan may be formulated and adopted in sections,  
10 these sections corresponding with hydrologic divisions of  
11 the state. The state water plan shall set out a progressive  
12 program for the conservation, development, and utilization  
13 of the state's water resources and propose the most  
14 effective means by which these water resources may be  
15 applied for the benefit of the people, with due  
16 consideration of alternative uses and combinations of uses.  
17 Before adoption of the state water plan or any section  
18 thereof, the department shall hold public hearings in the  
19 state or in an area of the state encompassed by a section  
20 thereof if adoption of a section is proposed. Notice of the  
21 hearing or hearings shall be published for 2 consecutive  
22 weeks in a newspaper of general county circulation in each  
23 county encompassed by the proposed plan or section thereof  
24 at least 30 days prior to the hearing.

25 (3) The department shall submit to the water policy

1 committee established in [section 21] and to each general  
2 session of the legislature the state water plan or any  
3 section thereof or amendments, additions, or revisions  
4 thereto which the department has formulated and adopted.

5 (4) The department shall prepare a continuing  
6 inventory of the groundwater resources of the state. The  
7 groundwater inventory shall be included in the comprehensive  
8 water resources inventory described in subsection (1) above  
9 but shall be a separate component thereof.

10 (5) The department shall publish the comprehensive  
11 inventory, the state water plan, the groundwater inventory,  
12 or any part of each, and the department may assess and  
13 collect a reasonable charge for these publications.

14 (6) In developing and revising the state water plan as  
15 provided in this section, the department shall consult with  
16 the water policy committee established in [section 21] and  
17 solicit the advice of the committee in carrying out its  
18 duties under this section."

19 Section 20. Section 85-1-621, MCA, is amended to read:

20 "85-1-621. Report to the legislature. The department  
21 shall prepare a biennial report to the legislature  
22 describing the status of the water development program. The  
23 report must describe ongoing projects and activities and  
24 those which have been completed during the biennium. The  
25 report must identify and rank in order of priority the

1 projects for which the department desires to seek  
2 congressional authorization and funding and the efforts the  
3 department will undertake in attempting to secure such  
4 authorization and funding. The report must also describe  
5 proposed projects and activities for the coming biennium and  
6 recommendations for necessary appropriations. A copy of the  
7 report shall be submitted to the president of the senate and  
8 the speaker of the house, to the members of the water policy  
9 committee established in [section 21], and to such other  
10 members of the legislature as may request a copy."

11 NEW SECTION. Section 21. Water policy committee.

12 (1) There is a permanent water policy committee of the  
13 legislature. The committee consists of eight members. The  
14 senate committee on committees and the speaker of the house  
15 of representatives shall each appoint four members on a  
16 bipartisan basis. The committee shall elect its chairman  
17 and vice-chairman. The committee shall meet as often as  
18 necessary, including during the interim between sessions, to  
19 perform the duties specified within this section.

20 (2) On a continuing basis, the committee shall:

21 (a) advise the legislature on the adequacy of the  
22 state's water policy and of important state, regional,  
23 national, and international developments which affect  
24 Montana's water resources;

25 (b) oversee the policies and activities of the



1 department of natural resources and conservation, other  
2 state executive agencies, and other state institutions, as  
3 they affect the water resources of the state; and

4 (c) communicate with the public on matters of water  
5 policy as well as the water resources of the state.

6 (3) On a regular basis, the committee shall:

7 (a) analyze and comment on the state water plan  
8 required by 85-1-203, when filed by the department;

9 (b) analyze and comment on the report of the status of  
10 the state's water development program required by 85-1-621,  
11 when filed by the department;

12 (c) analyze and comment on water-related research  
13 undertaken by any state agency, institution, college, or  
14 university;

15 (d) analyze, verify, and comment on the adequacy of  
16 and information contained in the water resources data  
17 management system maintained by the department under  
18 85-2-112; and

19 (e) report to the legislature, not less than once  
20 every biennium.

21 (4) The environmental quality council shall provide  
22 staff assistance to the committee. The committee may  
23 contract with experts and consultants, in addition to  
24 receiving assistance from the environmental quality council,  
25 in carrying out its duties under this section.

1 Section 22. Section 85-2-122, MCA, is amended to read:

2 "85-2-122. Penalties. A person who violates or refuses  
3 or neglects to comply with 85-2-301,--85-2-402(1),--and  
4 85-2-403(3) the provisions of this chapter, any order of the  
5 department, or any rule of the board is guilty of a  
6 misdemeanor."

7 NEW SECTION. Section 23. Extension of authority. Any  
8 existing authority of the board and the department of  
9 natural resources and conservation to make rules on the  
10 subject of the provisions of this act is extended to the  
11 provisions of this act.

12 Section 24. Section 7, Chapter 706, Laws of 1983, is  
13 amended to read:

14 "Section 7. Termination date. ~~This--act~~ Section 4 of  
15 [this act] terminates July 1, 1985. The other sections do  
16 not terminate and are permanent law."

17 NEW SECTION. Section 25. Repealer. Section 85-2-104,  
18 MCA, is repealed.

19 NEW SECTION. Section 26. Codification instruction.  
20 Sections 14, 17, and 21 are intended to be codified as an  
21 integral part of Title 85, chapter 2, and the provisions of  
22 Title 85, chapter 2, apply to sections 14, 17, and 21.

23 NEW SECTION. Section 27. Severability. If a part of  
24 this act is invalid, all valid parts that are severable from  
25 the invalid part remain in effect. If a part of this act is

1     invalid in one or more of its applications, the part remains  
2     in effect in all valid applications that are severable from  
3     the invalid applications.

4         NEW SECTION. Section 28. Applicability. This act  
5     applies to all permit applications, change in appropriation  
6     right applications, water sales and lease applications, and  
7     reservation applications filed and pending with the  
8     department on July 1, 1985, but upon which a hearing under  
9     Title 85, chapter 2, has not yet commenced.

10         NEW SECTION. Section 29. Effective date. This act is  
11     effective July 1, 1985.

-End-







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